

Ombudsman's Determination

Applicant	Mr S and Mr D
Scheme	S Willetts Fabrications Ltd Retirement and Death Benefit Scheme (the Scheme)
Respondents	Hornbuckle

Outcome

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

Complaint summary

3. The applicants have complained that there have been delays with transferring the Scheme to a new provider, Dentons, and that they have been overcharged for the below par level of Trustee management. The applicants wish to recover the fees they have paid to Hornbuckle plus the fees paid to Dentons and their representative.

Background information, including submissions from the parties

4. Mr S and Mr D are members and trustees of the Scheme which is a small self-administered scheme (**SSAS**). The Scheme has been administered by Hornbuckle since 2007.
5. The applicants say that in June 2014 they took the decision to transfer the Scheme from Hornbuckle to another provider, Dentons. As a result of the delay fees have accrued with Dentons which the applicants believe should be compensated for by Hornbuckle.
6. The applicants' representative says they have undertaken various complaint procedures with Hornbuckle since June 2014 and have uncovered various examples of mismanagement of the Scheme. These include:
 - an asbestos report, which was never given to Mr S and Mr D, regarding a property asset of the Scheme and this has been one of the causes of the transfer delay;

- the split of assets between Mr S and Mr D have not been carried out correctly; and
 - unauthorised payments have been made.
7. As a result of these issues the applicants believe that Hornbuckle's management fees from 2007 onwards should be refunded, plus interest. They estimate these costs to be in the region of £20-25,000. In addition Hornbuckle should meet Dentons fees, and the representative's fees, over the past three years of £10,000.
 8. Hornbuckle say that the physical management of the property lies with the Property Manager. The default position when a Property Manager has not been appointed is that the SSAS members are the Property Manager. The role of the Property Manager is, in its simplest form, to ensure rental payments are received, that the property is adequately maintained and that the tenant complies with the terms of their lease. These activities do not form part of the duties Hornbuckle would undertake as trustees.
 9. An Asbestos Survey Report was undertaken in 2006, prior to Hornbuckle becoming a trustee to the Scheme. The Report recommended annual inspections be undertaken to monitor the condition of the materials tested. The lease states that the tenant is responsible for obtaining necessary consents and complying with all legislation in relation to the use of the property. This would include the duty to manage asbestos. The tenant at the time, Midwest Oils Limited, had a responsibility for ensuring that there were sufficient assessments in place during the occupation of the property. In the event that this is not undertaken by the tenant, this responsibility would then fall to the Property Manager.
 10. Whilst Hornbuckle acknowledge that information in relation to the asbestos report could have been requested to ensure an annual record was kept on its files, it is the responsibility of the tenant and the Property Manager to ensure that the annual asbestos reports were completed.
 11. Hornbuckle sent Wealth Port Limited, the IFA for the scheme in 2008, the Royal Bank of Scotland (**RBS**) chequebook for safekeeping. The covering letter included the following statement:

“If any unauthorised cheques are raised Hornbuckle Mitchell Trustees Limited will recall the cheque book and the trust and duty of care by the member will be broken. Under Trust Law this is an offence and will be treated as such due to the Trustee Act 2000 imposing a duty of care on the trustees, which require the trustees to exercise such care and skill as is reasonable”
 12. Hornbuckle say that on 26 February 2008, an attempt was made to withdraw £11,000 from RBS which was stopped. As no payment left the account Hornbuckle decided on this occasion not to request the return of the chequebook from the adviser. On 20 March 2008, the same amount was withdrawn from the Barclays Account by Mr S, without authority from Hornbuckle, as the second trustee. Mr S was fully aware of the actions he took in withdrawing the funds.

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13. The overpayments and missed reviews were identified by Hornbuckle through a review of its past business. Bank statements were being issued directly to the clients, and only through Hornbuckle's reviews and a request for bank statements from the clients was it noted that the payment had gone out. Hornbuckle accepts that it should have noticed this earlier, however, if Mr S had not taken the money in the first place, this would not have been an issue. Following further correspondence in 2015, it was agreed that Mr S would pay the monies back over a 5 year period so that the Scheme is put back into the position it would have been in had the funds not been withdrawn.
14. Dentons has now confirmed that the transfer has completed and Hornbuckle is no longer joint owner or trustees of the scheme. A number of factors, such as the Asbestos report and non-payment of the fees, resulted in delays which were not Hornbuckle's fault.
15. The official transfer request was received from Dentons on 2 September 2014. Hornbuckle informed the IFA of the fees for the takeover and outstanding Scheme fees the following day, and chased for approval of the fees on 10 September 2014.
16. Hornbuckle again chased for fee approval on 16 September 2014, however, the IFA responded to say Mr S and Mr D did not want to pay the fees due to service issues. It was agreed that Hornbuckle would halve the takeover fee from £1,750 to £875, as a gesture of goodwill.
17. On 2 February 2015, Hornbuckle confirmed that the takeover could not complete until its fees were paid.
18. The IFA chased for an update on the transfer and copies of the invoices for the outstanding fees on 2 April 2015. These were issued on 7 April 2015 and an explanation of the reason for the fees was provided the following day. Hornbuckle received a cheque in respect of the fees from Mr S and Mr D on 24 April 2015.
19. The takeover was finalised and completed on 28 April 2015, and the completed Deed of removal was issued to Dentons the same day. At this point Hornbuckle was no longer a joint trustee or joint owner of the property and Dentons was responsible for the re-registration of the property and the assets. No further fees were taken from the Trustee account.
20. Hornbuckle received an instruction from the Solicitors, acting on behalf of Dentons, on 7 July 2015, for the transfer of the property. Hornbuckle confirmed to the solicitors that it did not need a solicitor to act on its behalf as it was being removed from co-owning the property.
21. Hornbuckle has noted that it is being asked to cover the representative's costs. Firstly, the representative is not the clients' financial adviser, he is their brother in law. Hornbuckle does not have a contract or agreement with the representative and the first contact was received from him on 8 January 2016. This was after the Deed of Removal was signed and completion of the Scheme transfer to Dentons. The clients chose to use their brother in law to help them with the Scheme even though they still

had an IFA. The Ombudsman service and The Pensions Advisory Service is a free of charge service to the public and will help applicants through the process. Therefore, Hornbuckle does not agree that it should pay any fees/charges to the representative as the clients had cheaper options and were also still employing an IFA.

Adjudicator's Opinion

22. The applicants' complaint was considered by one of our Adjudicators who concluded that no further/further action was required by Hornbuckle. The Adjudicator's findings are summarised briefly below:-

- This complaint is concerned with the level of fees and management of the Scheme. From the information that the representative has provided, it is clear that Dentons has found that some parts of the administration records are not as complete as it would like. The two main areas identified are:
 - a restriction in the Deed when the property was transferred from a previous provider, Hazell Carr to Hornbuckle; and
 - the split of investments between Mr S and Mr D in connection with an Old Mutual policy.
- On the first of these issues, Hornbuckle acknowledged that the restriction should have been removed when the property was transferred and has paid the solicitor's cost for removing this. On the second issue, the Adjudicator suspected that the position had arisen partly as a result of the unauthorised withdrawal of funds by Mr S and the interaction over how to deal with the issue. The Adjudicator recognised that this would require some additional work by Dentons to correct the position, but did not think this was sufficient justification for Hornbuckle to reimburse all its fees back to 2007 and to meet all of Dentons fees incurred with the transfer of the Scheme. Hornbuckle has offered a reduction in its transfer fee from £1,750 to £875 which the Adjudicator considered to be reasonable.
- The representative has also raised other areas of concern which he says have delayed the transfer and led to increased fees, namely the lack of an asbestos report or management plan, and the fact that unauthorised payments have been made. But Hornbuckle was not the Property Manager and this role fell to Mr S and Mr D as members of the SSAS. The asbestos survey report was issued in 2006, prior to Hornbuckle's appointment, and so Mr S and Mr D would have been aware that annual inspections were required; they should have arranged this. Therefore, Hornbuckle should not be held responsible for the failure to carry out such inspections.
- Finally the representative has said that unauthorised payments have been made and these contributed to the delay. But the unauthorised payment relates to the withdrawal of £11,000 made by Mr S in 2008 without Hornbuckle's agreement. The Adjudicator did not consider that Hornbuckle could be held responsible for any

additional fees that Dentons may have incurred as a result of an unauthorised payment made, without Hornbuckle's agreement, by one of the applicants.

23. The applicants did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The applicants have provided their further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by the applicants for completeness.
24. The representative has explained that he was a financial adviser prior to his retirement, employed by Wealth Port Limited (now Sanlam), where he used to manage the Scheme. The applicants approached him in 2014 to seek his help in finding a replacement for Hornbuckle. He set up a meeting with Dentons and a representative from Sanlam. The Sanlam representative informed him that Hornbuckle had said that the transfer would be completed by August 2014 and three quarters of the prepaid fee of £4,000 would be refunded. But three and a half years later the transfer was still not complete.
25. During this period several unacceptable management issues have been uncovered; namely, the restriction in the Deed and the ten years it took to rectify the position, which he said was unacceptable; and the way the split of investments between Mr S and Mr D was dealt with.
26. Furthermore Hornbuckle have contributed to the confusion over the split of assets between Mr S and Mr D. In 2013, Hornbuckle arranged a withdrawal of £13,500 for Mr D but Hornbuckle made the withdrawal from Mr S' account. This error was not corrected until 2017, when identified by Dentons. The discrepancy was not taken into account by Hornbuckle when carrying out the split calculations over the last four years.
27. Although the applicants accept that the lack of an asbestos report may have delayed the transfer slightly, another main concern was that there was no guidance or direction from Hornbuckle with regard to the members' responsibilities. This is at variance with Dentons approach who explained the role of a Property Manager and the requirements of a management plan to them.

Ombudsman's decision

28. The applicants' representative has queried the finalisation of the transfer and says that it took three and a half years to complete, however, Hornbuckle say that the transfer was completed in less time, on 28 April 2015. I find that there is a difference in interpretation on what is meant by the term 'transfer'. The applicants' representative believes that this is when all the administrative aspects of the transfer have been completed whereas Hornbuckle mean that the ownership of the Property and funds have been transferred.
29. The representative also believes that Hornbuckle should meet the costs of updating or correcting any records that have not been correctly maintained. I agree, provided

that the errors have not been caused by the members themselves. The two areas identified: was the need to rectify the Deed, which Hornbuckle agreed to meet the cost of doing this, and reconciliation of the split of investments. The reconciliation has been complicated by an unauthorised payment that Mr S had made. This was compounded by a further withdrawal that Hornbuckle made for Mr D from Mr S' account. But I find that Hornbuckle could not correct the position on the two accounts until Mr S was able to confirm whether he was going to return the unauthorised payment. Mr S did not confirm this until 2015, just before the transfer occurred. Thus it fell to Dentons to correct the position. I also note that Hornbuckle has offered a reduction in its transfer fee from £1,750 to £875, which I consider to be reasonable.

30. Finally the applicants' representative has raised the issue of the difference in approach between Hornbuckle and Dentons and the latter's explanation of the role of a Property Manager. Whilst I appreciate that there are differences in the way that companies manage their relationships with clients, I do not find that the lack of information, provided by Hornbuckle on the role of a Property Manager, to be sufficient grounds to uphold the complaint. The Scheme was previously transferred from Hazell Carr, so Hornbuckle may have assumed that this role had already been explained to them by Hazell Carr, or an adviser.
31. Therefore, I do not uphold the applicants' complaint.

Anthony Arter

Pensions Ombudsman
28 February 2018