

**PENSION SCHEMES ACT 1993, PART X  
DETERMINATION BY THE PENSIONS OMBUDSMAN**

<b>Applicant</b>	Mr Robert Johnson and Mrs Liza Johnson
<b>Scheme</b>	Hornbuckle Mitchell SIPP ( <b>the SIPP</b> )
<b>Respondent</b>	Hornbuckle Mitchell Group Ltd ( <b>HM</b> )

**Subject**

Mr and Mrs Johnson's complaint against HM follows a failure to pay taxes on a plot of land (**the land**) in the United States, which formed part of their SIPP investments which resulted in the land being repossessed by the regional authority in Florida and then sold. Mr and Mrs Johnson complain that the compensation offered by HM is inadequate and that HM could have taken steps to prevent the land from being sold on.

**The Pensions Ombudsman's determination and short reasons**

The complaint should be upheld against HM. This is because they have not offered Mr and Mrs Johnson appropriate compensation for the loss to their SIPP resulting from their admitted failure to pay the taxes on the land, which led to the land being repossessed and sold.

## DETAILED DETERMINATION

### Material Facts

1. HM act as the SIPP administrator. The SIPP's assets are held by Hornbuckle Mitchell Trustees Limited for the benefit of the members.
2. The land in question was acquired by HM acting on behalf of Mr and Mrs Johnson in 2007. The cost was \$280,000 with, according to a letter from an accountant in 2007, associated fees of a further \$16,820.
3. The regional authority in Florida, where the land is, repossessed it in 2011 because of non-payment of taxes. The land was subsequently sold on 28 November 2011 to a third party for \$11,500. It was sold again for \$22,000 in 2012. The new owners were successful in a "Quiet Title" action against HM (which HM did not defend) which meant that no further ownership claims could be made by HM for the land.
4. HM have accepted responsibility for not paying the taxes levied against the land, which subsequently led to its compulsory sale to a third party. It seems that they did not know that the taxes were due – and I detect a feeling that Mrs and Mrs Johnson, who are residents of Florida, could have told them. However HM recognise that the fault lay with them.
5. HM say that they made two unsuccessful attempts to reacquire the land and on both occasions offered to either buy a similar plot in the same area or pay redress. They say that they were offered the land at a price significantly over its proper valuation which they suspect was because the seller was aware of the dispute between them and Mr and Mrs Johnson.
6. In May 2012 HM made a "without prejudice" offer (on which privilege has been apparently waived) of paying \$15,000 in total to the SIPP or to "...work with Mr and Mrs Johnson to acquire in the open market similar land in the area, which would enable them to capture the very substantial re-bound in property values in the area."
7. That offer was not taken up.
8. In a letter to this office of 22 August 2013, HM said,
  - 4.2 We have commissioned two land appraisal reports from independent, experienced, local, licensed appraisers in connection with our attempts to reacquire the Property.
  - 4.3 The first of these, prepared in April 2012 by Mr Donald Ward, Jr ... provided an estimated market value for the Property of

\$15,000. This report referred to actual sale prices of 4 comparable properties of which one was only 0.18 miles from the Property.

...

- 4.4 The second report, the Valbridge Appraisal...gives a market value for the property of \$26,000 in April 2013. This report refers to actual sale prices of 5 comparable properties.

...

- 4.5 Whilst not wishing to place undue reliance on websites, in order to provide additional support for the fact that market values are of the order quoted, please see attached...print-out from the FindData website, updated on 5 August 2013...which gives the market value of the Property as \$12,500..."

**“9. Alternatives**

- 9.1 Since it appears that it is not possible to reacquire the property...there are a number of alternatives. First we can make it clear to the current owners that their attempt to extort a 688% premium over market value has failed and wait until they decide to accept the generous offer made. We understand that the Johnsons do not wish us to do this.

- 9.2 Secondly, and most simply, we can pay \$26,000, an equivalent sum to that which the Property would be worth today, into the SIPP, meaning that the Johnsons would have suffered no loss. Our offers to do so have been rejected. (We have not sought to net off property taxes that would have been incurred by the SIPP to reduce the amount of restitution but have offered full market value.)

- 9.3 Thirdly, we could acquire an alternative property as close as possible to the Property, for a roughly equivalent price. Again, our offers to do so have been dismissed by the Johnsons.”

9. I have seen the valuation from which the figure of \$26,000 is derived.

10. Mr and Mrs Johnson have rejected the payment of \$26,000. They say ,

“We have been advised that, had HM been operating under US law, the courts would almost certainly have awarded us the full original purchase price...in compensation for their error, plus in all probability the money that we invested in the property. That would amount to approximately \$355,000 in total. Our concern however is that real estate prices are now increasing so quickly in this part of Florida that even if we were to be awarded that amount, any further dilatory tactics on the part of HM could still see us ending up out of pocket.”

11. The figure of \$355,000 is based on the original purchase costs, plus the costs of clearing and improving the site for use as a nursery. Mr and Mrs Johnson have produced invoices totalling \$70,000 in relation to this work. (They appear to be

dated 8 January 2012, being *after* the land was sold, but for reasons that follow, nothing turns on the date.)

12. Mr and Mrs Johnson have said that HM should be compelled to purchase an equivalent piece of land entirely at their own expense. However, they also say that there are currently no comparable plots of land for sale in the area.
13. Very recently Mr and Mrs Johnson have obtained a valuation of \$140,000. HM say that their preference, if no agreement can be reached, would be for both parties to approach the Florida Association of Property Appraisers (or the American Society of Property Appraisers) to appoint a single appraiser whose decision would be regarded as binding.

### Conclusions

14. This is a relatively straightforward matter. It concerns only what the proper compensation should be. HM have accepted liability. (Mr and Mrs Johnson say that, as well as losing the land, HM could have rescued the position by defending the Quiet Title action. However, whether they could or not makes no difference to the position now, which is that the SIPP should be compensated for its loss.)
15. Mr and Mrs Johnson argue that they should be compensated by a sum equal to their original expenditure. Whatever the position may be in US law, the proper compensation under UK law would relate directly to the value of the property. What they had, when it was sold, was a property apparently worth considerably less than their original investment. The maladministration by HM caused the land to be repossessed; it did not cause the value of the land to decrease.
16. The overall impression from the papers is that Mr and Mrs Johnson have taken an aggressive negotiating stance, verging at times on the unreasonable. That has scarcely helped matters towards a conclusion. They say now that HM should be compelled to buy an equivalent property, though they also say that none is available. In 2012 HM offered to work with them to secure an equivalent property, but that offer was not pursued. If it had been it might have resulted in agreement.
17. Whilst offering to pay for an equivalent property, if one could be found, was reasonable and might have led to a conclusion, the proper assessment of loss to the SIPP could only ever have been in cash and I have seen no adequate offer of cash redress.

18. Given that it was not possible for HM to secure the same plot (or at least not at an agreed fair price) or to agree on an alternative plot, the SIPP should have been put in a position that would theoretically allow it to make an appropriate purchase when, or a reasonable time after, compensation is paid.
19. In my judgment the cash offer, latterly of \$26,000, did not adequately achieve that. The valuation in April 2013 made no allowance for cost to the SIPP of securing a new property, if one was available, nor was there any margin to compensate for the risk of prices increasing over a reasonable time in which a replacement plot might be sought and secured. HM rightly observe that the SIPP has, in a sense, benefited from not being liable to pay tax on the property once it had been sold. But I do not think that the fact that HM offered to ignore that benefit can be seen as compensating for the costs of securing a new property.
20. Mr and Mrs Johnson suggest that because HM's land valuers were paid for by HM they are therefore not independent. The land valuers were quite clearly separate entities to HM and there is no evidence of control or influence having been asserted.
21. Mr and Mrs Johnson suggest that the Pensions Ombudsman Service should conduct its own independent investigation and instruct agents to establish the value of the land. Although I have investigatory powers, I exercise them as required by the circumstances of the case. I do not consider that it would be good use of my office's resources to obtain my own valuation, where other possibilities exist.
22. It has always been open to Mr and Mrs Johnson to provide their own independent valuation but they have not done so until very recently, when the Pensions Ombudsman Service's investigation was almost complete. Had they done so earlier, and had there still been disagreement following a valuation they could then have included the cost of the valuation as a head of loss. I would very probably have made an award.
23. I can well understand that Mr and Mrs Johnson would find it extraordinary and upsetting that such a significant asset (at least at the time it was purchase) was lost from the SIPP. It seems to me that alongside Mr and Mrs Johnson's negotiating position having been unhelpful, HM have from time to time lost sight of the fact that they were at fault and they made a very significant error in not monitoring what was happening. (If they were relying on Mr and Mrs Johnson's local knowledge in agreeing to the purchase in the first place, that is not clear from the papers I have seen.)

**Directions**

24. First, I direct that HM should forthwith pay Mr and Mrs Johnson a total of £1,000 to compensate them for the distress and inconvenience of losing an investment.
25. Next I direct that HM should obtain a new and up-to-date valuation and having done so, if Mr and Mrs Johnson agree, they are to pay that sum to the SIPP, plus 5% to allow for expenses and a margin for increase, less the tax that would have been due to the date of payment if the land had remained in the SIPP.
26. If Mr and Mrs Johnson do not agree, then within 28 days of receiving HM's calculation of compensation as above, they may obtain their own valuation from a person recognised in Florida to have the qualification and expertise to value the land (or they may use the valuation recently obtained if it meets that criterion). Should that valuation exceed HM's valuation then, if HM agree, the midpoint between the two is to be taken as the value of the land to be paid to the SIPP, with the same adjustments for expenses etc and tax as above.
27. Should no agreement be reached in relation to the valuations above (or if Mr and Mrs Johnson do not submit a valuation) then, at HM's expense, the parties shall apply to the Florida Association of Property Appraisers (or failing that the American Society of Appraisers) to appoint a single expert appraiser (the person so appointed will not need the agreement of the parties). HM shall pay a sum equal to the valuation of that appraiser to the SIPP, with adjustments as above.
28. In the (I hope unlikely) event that the parties remain in dispute as to any aspect of the directions as above, they may revert to me for further directions.

**Tony King**  
Pensions Ombudsman

30 December 2014