PO-22695

Ombudsman's Determination

Applicant	Mr R
Scheme	Commando 2012 Pension Scheme (**the Scheme**)
Respondents	LD Administration Ltd (**Liddell Dunbar**) The Trustee of the Commando 2012 Pension Scheme (**Mr Garner**)

Complaint Summary

Mr R has complained that Mr Garner and Liddell Dunbar have delayed the transfer of his pension benefits in the Scheme and that the transfer has not been made. Mr R has also claimed consequential losses as a result of the delay.

Summary of the Ombudsman's Determination and reasons

The complaint shall be upheld against Mr Garner because he has failed to pay the transfer payment within the statutory timeframe. Furthermore, Mr R has suffered an exceptional level of distress and inconvenience due to the delay and has incurred additional expenses for which he should be reimbursed.

The complaint shall be upheld against Liddell Dunbar relating to maladministration on its part, for its failure to provide copies of annual reports or members' annual benefit statements.

Detailed Determination

Material facts

1. Section 94 of the Pension Schemes Act 1993 (**the Act**), provides that a member of an occupational or personal pension scheme has a right to a "cash equivalent transfer value" (**CETV**) of any benefits which have accrued under the transferring arrangement.

2. Section 99 of the Act requires trustees to carry out the member's requirements within a specified period for the purposes of the scheme in question; here, essentially within six months of the application to transfer. It also requires trustees to notify The Pensions Regulator (**TPR**) if they have failed to carry out the transfer within six months of the guarantee date (in respect of salary related occupational pension schemes). The relevant sections of the Act can be found in the Appendix.

3. The Scheme was established by deed on 28 June 2012 (the **Deed**). Mr Garner is named as Trustee, and Manorcrest Limited (**Manorcrest**) is named as "the Provider". Mr Garner is the sole director of Manorcrest and is registered at Companies House as the sole person with significant control of Manorcrest.

4. The rules which govern the Scheme, together with the Deed (the **Scheme Rules**), name Mr Garner as the Scheme Administrator and Liddell Dunbar as Scheme Practitioner. Rule 1 of the Scheme Rules also states:

   "The scheme is an Occupational Pension Scheme. It is established by a UK registered Employer (the Provider) whose officers and employees are automatically eligible to become members, although others may also become members if permitted by the Trustees or Provider.

   Its only purpose is to provide Authorised Member Payments sums as described in the scheme documents (including these rules)."

5. In relation to transfers, Rule 9.1 of the Scheme Rules states:

   "A member has a right to request that the "cash equivalent" of all the accumulated funds, assets and other rights held within any or all arrangements under the scheme should be transferred in accordance with section 169 of the 2004 Act to:

   • Another registered pension scheme; or

   • A qualifying recognized overseas pension scheme.

   The transfer must be made by a direct payment between the trustees/scheme administrator and the administrator or trustee of the other scheme. The transfer may not be paid or passed through a financial intermediary or broker. If the scheme has appointed a pensioneer or managing trustee, then the pensioneer or managing trustee must be a party to the transaction.

The scheme administrator will make enquiries of the proposed receiving scheme to satisfy itself that the receiving scheme qualifies as a registered pension scheme or qualifying recognised overseas pension scheme. Unless satisfactory evidence is received, the scheme administrator will not process the transfer of funds."

6. The Scheme's statement of investment principles (**Statement of Investment Principles**) states that:

   "In setting the investment strategy, the Trustees invest primarily in preference shares in the capital of Norton Motorcycles (UK)Limited[1] (**the Company**)." (paragraph 3 of the Statement of Investment Principles).

7. The Statement of Investment Principles goes on to say that:

   "Funds invested in the Scheme are designed to maximise their return over a five year plus period to coincide with the investment in preference shares issued by the Company. In order to protect the investments of all members, funds cannot be withdrawn within 24 months of the date of transfer into the Scheme. The Scheme applies charges on a sliding scale for the early transfer out of funds after 24 months and prior to five years of investment."

   and, after five years of investment, no charge applies for transfers out. (paragraph 4 of the Statement of Investment Principles).

8. Mr R has never been employed by the Company or by any other employer relating either to the Scheme or to Mr Garner. He transferred £115,890.83 into the Scheme in November 2012.

9. Mr R has been suffering from chronic ill health for a number of years and his condition has been rapidly deteriorating over the last few years.

10. In August 2017, Mr R submitted the relevant forms to Liddell Dunbar to begin drawing-down his pension from November 2017, five years from the date he transferred into the Scheme. He initially intended to take out £20,000.

11. Liddell Dunbar responded to Mr R in December 2017, after repeated chasing by Mr R's daughter (**Mrs Y**), who was acting on his behalf, to say that the drawdown request had been processed but needed to be actioned by Mr Garner.

12. In February 2018, after further chasing Mr R decided to transfer to a personal pension with Pension Bee. Liddell Dunbar received a transfer request from Pension Bee on 21 February 2018. At that point, Mr R's fund value was £137,620.36. After carrying out the necessary due diligence checks, Liddell Dunbar passed the transfer request to Mr Garner on 14 March 2018.

[1] It appears, however, from documents filed at Companies House in respect of Norton Motorcycles (UK) Limited and Norton Motorcycles Holdings Limited, that Scheme funds have in fact been invested in Norton Motorcycles Holdings Limited and not in Norton Motorcycles (UK) Limited.

13. Between March and May 2018, further correspondence was sent between Liddell Dunbar, Mr R's daughter who was acting on his behalf (**Mrs Y**), and Mr Garner, on when Mr R's pension would be transferred. In particular, Mr Garner wrote to Mrs Y on 6 April 2018 and said:

> "Unfortunately in the last several months we have had an unprecedented amount of transfer requests, primarily due to an HMRC tax charge to some members and they [have] requested transfers out to pay tax bills.
>
> We are working closely with the Norton accounting team and making good progress in getting transfer requests completed. As the scheme is fully invested, it does take time for Norton to cashflow all requests as they are obviously a trading business and using the capital for trading the business. They are in good shape, it is simply a timing issue as they manage funds for the transfer.
>
> [Mr R] is now towards the top of the transfers list and we expect to have a positive transfer date for you shortly. Looking at the transfers to do I expect a mid May transfer for [Mr R]."

14. In May 2018, as the transfer had not happened, Mr R brought his complaint to this Office.

Summary of Mr R's position

15. Mr R has been suffering from severe ill health and wanted to start drawing down from his pension so that his wife could reduce her main working hours to care for him. Instead, Mr R and his family have spent the last few years concerned about when he will be able to access his pension funds.

16. Mr R's original plan was to drawdown the tax-free portion of his pension funds to pay off a significant portion of his mortgage. The mortgage is interest only, at a rate of 1.04%, and does not have an exit charge for settling it early. At the end of 2018, Mr R was paying off this mortgage at a rate of £1,108.59 per month. Reducing the outstanding balance would also result in a reduction to his monthly repayments. As the transfer delay is ongoing, Mr R is having to pay off his mortgage at a higher rate.

17. Mr R was also anticipating that he would be able to draw down from his pension funds from November 2017. In addition to other income he has, he was expecting to pay 20% income tax and was planning to take out a further £15,000 of his funds, from the Scheme, over the following two and a half years to pay off his mortgage which ends in June 2020. Due to the delay in being able to access his pension funds, he will now have to draw down larger amounts in a single tax year to settle his mortgage and will therefore move into the 40% tax bracket. As a consequence, Mr R has calculated that he will lose £5,000.

18. Mr R runs his own business and due to his chronic condition, which he anticipates will get worse, he was planning on drawing down from his pension as a primary source of income, rather than solely using his business earnings. As Mr R has still

not been able to access his pension, he has had to rely on his overdraft and consequently has paid further interest and overdraft fees.

Summary of Mr Garner's position

19. Mr Garner has not responded to enquiries from this office, and all references to comments he has made are drawn from the replies received by Mr R and his representative.

20. Mr Garner also failed to respond to the Preliminary Determination in the required timescales.

Summary of Liddell Dunbar's position

21. Liddell Dunbar denies that it has held up the transfer payment. It did act as administrator from 2014 to 2018 but was not involved when the Scheme was initially established. Mr Garner then took on the role of administrator.

22. It acts as the Scheme practitioner and carries out some basic administration for the Scheme, including dealing with member queries and handling transfer and/or drawdown requests. These are then forwarded to Mr Garner for approval and payment.

23. Liddell Dunbar also failed to respond to the Preliminary Determination.

Conclusions

24. The transfer request from Pension Bee, in respect of Mr R's funds under the Scheme, was received by Liddell Dunbar on 21 February 2018. Mr Garner and Liddell Dunbar appear to have agreed that the necessary information to complete the transfer had been provided and Mr R was informed that the transfer was expected to be completed during May 2018, but the transfer still remains to be completed.

25. Mr R has a statutory right for the transfer to be completed within a six month timeframe, as explained in paragraph 2 above. Mr Garner has clearly failed to comply with that requirement and I intend to notify the Pensions Regulator of his failure to do so.

26. Mr Garner has not updated Mr R since April 2018, nor has he produced any cogent reasons why the pension funds are yet to be transferred.

27. I find his behaviour inexcusable.

28. Mr R says he has incurred consequential losses due to the transfer delay; the largest being the alleged loss of £5,000 due to Mr R's income being taxed at a higher rate. I fully appreciate that the transfer delay has hindered the way in which he planned to drawdown from his pension fund, however, applicants have a duty to mitigate any foreseeable financial loss. In this instance, Mr R could adjust either the income he receives from his business or the amount he plans to drawdown from his pension, to

ensure that his overall income is not taxed at a higher rate. Therefore, I do not uphold this part of Mr R's complaint.

29. Mr R has also claimed that he has incurred costs relating to overdraft fees and interest payments, as he intended using his drawdown payments as a primary source of income. However, as explained in paragraph 28 above, I believe that Mr R could have mitigated that loss by adjusting the income he received from his business. Therefore, I do not uphold this part of Mr R's complaint.

30. I am, however, conscious that as a consequence of Mr R having to drawdown less from his pension funds it means that he would not be able to pay off his interest only mortgage as quickly as he planned, so he would be charged a higher amount of interest on his repayments. Some account should be taken of this in the award to Mr R.

31. On the balance of probabilities, I accept that Mr R has incurred a loss, as a result of his inability to pay off part of his mortgage during the period between the time when he should have received his transfer value and the date on which he will actually receive it. The exact figure of that loss will not be known until the transfer has taken place. However: based on the update that was provided to Mrs Y by Mr Garner on 6 April 2018 (see paragraph 13 above), which informed Mr R that the transfer was expected to be completed in May 2018; taking all of the facts into account, in particular that all necessary information had been provided; and in accordance with good practice, I consider that the transfer should have been completed by 31 May 2018. The calculation of Mr R's loss will therefore be made on that basis.

32. Finally, Mr R has undoubtedly suffered a high degree of distress and inconvenience. Mr R is suffering from a chronic condition and this complaint, which has been on-going since November 2017, has exacerbated an already difficult situation. Mr R has been without his pension funds which he planned to use to allay his financial situation, and his financial planning has been significantly impeded by his inability to access those pension funds.

33. Mr Garner has failed to engage with this Office and has not addressed any of the concerns raised by Mrs Y on Mr R's behalf. Mr Garner is in dereliction of his duties as Trustee which has caused Mr R exceptional distress and inconvenience. Therefore, I direct that Mr Garner shall pay Mr R £3,000 for the exceptional distress and inconvenience he has experienced.

34. I turn now to Liddell Dunbar's conduct as the Scheme administrator. Liddell Dunbar has stated that it was the Scheme administrator from 2014 to 2018. However, when asked by my office, as part of my office's investigation into this case, to provide copies of annual reports or annual benefit statements that had been sent to members, Liddell Dunbar was unable to do so.

35. Clearly, Liddell Dunbar's failure to keep adequate records concerning the Scheme and its members falls short of the standard of care that can reasonably be expected of a scheme administrator and it has prevented my office from progressing the

investigation into this case as quickly as it might have done. I find that Liddell Dunbar's shortcomings amount to maladministration, which has added to members' distress by hindering my office's investigation and attempt to properly conclude these matters.

Further Observations

36. Mr R has complained to my office of his inability to obtain a transfer and I am determining his complaint on that basis. I expect Mr Garner to act immediately on the directions I make below, allowing Mr R to address his personal finances and alleviate his distress. However, I should add that my investigation has revealed other concerns in relation to the underlying operation and investment strategy of the scheme, albeit that is not what Mr R asked my office to consider and it will not necessarily aid him, at this time, to seek to change or extend his complaint. Mr R should note that, in the event that Mr Garner does not comply with my Directions, in addition to his right to enforce the Directions through the County Court, it will still be open to him to make another complaint to my office concerning Mr Garner's actions and omissions as Trustee of the Scheme prior to the transfer request.

37. We have received a number of complaints concerning the Trustee's failure to action members' requests to withdraw their monies from the Scheme, and from two other pension schemes of which Mr Garner is the sole trustee; the funds of which are also invested solely in Norton Motorcycle Holdings Limited. I have some concerns over the operation of all of these schemes, which I shall outline briefly below.

38. I also intend to bring these matters to the attention of the Pensions Regulator.

Purpose of the Scheme:

39. It appears to me, based on the information obtained by my office during our investigation, that the Scheme, and the other two pension schemes mentioned above, have been set up in such a way as to provide funds to Norton Motorcycles (UK) Limited (**Norton Motorcycles**). Norton Motorcycles Holdings Limited (Norton Holdings) appears to derive its income from its holding in the trading company Norton Motorcycles. I presume the money invested in Norton Holdings preference shares by the pension scheme members has been passed across to Norton Motorcycles. This does not accord with the purpose of the Scheme as set out in Rule 1 of the Scheme Rules which, as mentioned in paragraph 4 above, is to provide authorised payments to members.

Conflict of interest:

40. Mr Garner is the sole Trustee of the Scheme, as well as being the sole director of Manorcrest and the CEO and owner of Norton Motorcycles. There is a clear conflict between Mr Garner's interests in respect of Manorcrest and Norton Motorcycles and his duties as Trustee of the Scheme.

41. In allowing this conflict of interest to have arisen and continue, it is possible that Mr Garner has been acting in breach of his fiduciary duty, as a pension scheme trustee, to avoid conflicts of interest and his duty not to profit from his position in relation to Manorcrest and Norton Motorcycles at Scheme members' expense.

Statutory investment duties:

42. Section 36(1) of the Pensions Act 1995 (the **1995 Act**), includes the requirement for trustees to exercise their powers of investment in accordance with The Occupational Pension Schemes (Investment) Regulations 2005 (**the Investment Regulations**).

43. The Investment Regulations, which set out specific requirements in relation to trustees' exercise of their investment powers under section 36(1) of the 1995 Act, are restricted in their application to the Scheme, by virtue of Regulations 6(1) and 7(1), on the basis that the Scheme has fewer than one hundred members.

44. However, despite the above restriction, Regulation 7(2) of the Investment Regulations still requires trustees of schemes with fewer than 100 members to "have regard to the need for diversification of investments, in so far as appropriate to the circumstances of the scheme".

45. Based on the information that I have received to date, it is difficult to see how the Trustee could reasonably claim that he had met the requirement under Regulation 7(2) of the Investment Regulations, given that all of the Scheme's assets were invested in the same company.

Requirements under case law

46. Case law provides further requirements for trustees to meet in exercising their power of investment, including the following:-

- Trustees are required, in investing scheme assets, to take such care as an ordinary prudent person would take if he invested "for the benefit of other people for whom he felt morally bound to provide" (*Re Whiteley [1886] UKHL 1).*

- Trustees must act in members' best financial interests (*Cowan v Scargill [1984] 2 All ER 750*).

47. I cannot see how, in investing all of the Scheme's assets in the Company, the Trustee could be considered to have complied with either of the requirements set out in paragraph 46 above.

The Pensions Regulator's code of practice

48. The Pensions Regulator's code of practice no.13 entitled: "Governance and administration of occupational trust-based schemes providing money purchase benefits" (**the Code**) applies to the Trustee. Of particular note is paragraph 107 of

the Code, which is concerned with the security and liquidity of assets. Paragraph 107 says:

> "The law requires trustee boards to invest scheme assets predominantly in instruments admitted to trading on regulated markets. Where investment options which are not admitted to trading on regulated markets are offered, we expect trustee boards to identify those as such in the SIP and explain why it was appropriate to include them in that form. This includes how such investment aligns with the objectives set out in the SIP."

49. The sole investment option for investment in Norton Holdings preference shares cannot be described as an instrument trading on regulated markets. Furthermore, as Norton Holdings is a private company the shares are not readily realisable and restricts the liquidity of the assets. It does, to my mind, represent an excessive concentration of risk.

50. Indeed, looking at the overall management and governance of the Scheme and the other pension schemes, there are a number of areas that I have identified where there is a lack of adherence to the Code.

Investment governance

51. Mr Garner has authority to make investment decisions on behalf of the Scheme, but the decision to invest solely in preference shares of Norton Motorcycles seems to have been taken without any advice or any recognition of the risk associated with such a decision.

Requirements of the Scheme's Statement of Investment Principles

52. Paragraph 3 of the Statement of Investment Principles states that "The Trustees aim to invest the assets of the Scheme prudently to ensure that the benefits promised to members are provided."

53. I do not consider that the concentration of investment in Norton Motorcycles can be considered as prudent. The Statement of Investment Principles also fails to explain why Mr Garner believes an investment in Norton Holdings or Norton Motorcycles is appropriate given that they are unquoted companies and not readily realisable.

Administration

54. There does not appear to be an adequate administration process for the Scheme. Liddell Dunbar provides a basic interface between Mr Garner and the members, but a number of administrative procedures do not appear to have been actioned. During our investigation we asked for copies of annual reports or annual benefit statements sent to members, but Liddell Dunbar was unable to provide these.

Employer related investments

55. It appears to me[2] that the investment of all of the Scheme's assets in Norton Motorcycle Holdings Limited is potentially in breach of the restrictions on employer-related investments under section 40 of the Pensions Act 1995.

Directions

56. I direct that within 21 days of this determination Mr Garner shall make the following payments:

    (i) £3,000 to Mr R for the exceptional distress and inconvenience he has experienced;

    (ii) a sum, to be quantified once the transfer has taken place, in respect of the additional mortgage interest payments that Mr R will incur in the period from 31 May 2018 to the date that the transfer payment is made;

    (iii) pay to Pensions Bee the transfer value that would otherwise have been payable on 31 May 2018; and

    (iv) on receipt of the transfer value, if Mr R is able to establish any loss on investment in respect of the period from 31 May 2018 to the date of the transfer, within 21 days of receipt of proof of such investment loss, Mr Garner should pay the additional amount plus any fees owed by Mr R to Pension Bee in respect of its carrying out the investment loss calculation.

57. I direct that within 21 days of this determination Liddell Dunbar shall pay £2,000 to Mr R for the severe distress and inconvenience he has suffered as a consequence of the investigation into his case being hindered by Liddell Dunbar's failure to keep adequate records concerning the Scheme and its members.

Anthony Arter

Pensions Ombudsman
28 May 2019

[2] although it is to be noted that this is outside my jurisdiction by virtue of Regulation 4 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996. However, the apparent breach of Section 40 Pensions Act 1995 will be included in our report to the Pensions Regulator.

Appendix

Pension Schemes Act 1993

94 Right to cash equivalent

(1) A member of a pension scheme who has received a statement of entitlement under section 93A acquires a right to take the cash equivalent shown in that statement in accordance with this Chapter.

(2) A member of a pension scheme who has transferrable rights in relation to money purchase benefits acquires a right to take their cash equivalent in accordance with this Chapter.

99 Trustees' duties after exercise of option

(1) Where—

(a) a member has exercised the option conferred by section 95; and

(b) the trustees or managers of the scheme have done what is needed to carry out what the member requires,

the trustees or managers shall be discharged from any obligation to provide benefits to which the cash equivalent related except, in such cases as are mentioned in section 96(2), to the extent that an obligation to provide such guaranteed minimum pensions continues to subsist.

(2) Subject to the following provisions of this section, if the trustees or managers of a scheme receive an application under section 95 they must do what is needed to carry out what the member requires—

(a) in the case of an application that relates to benefits other than money purchase benefits, within 6 months beginning with the guarantee date shown in the relevant statement of entitlement, and

(b) in the case of an application that relates to money purchase benefits, within 6 months beginning with the date of the application.

(7) Where the trustees or managers of an occupational pension scheme have not done what is needed to carry out what a member of the scheme requires within six months of the date mentioned in paragraph (a) or (b) of subsection (2)—

(a) they must, except in prescribed cases, notify the Regulatory Authority of that fact within the prescribed period, and

(b) section 10 of the Pensions Act 1995 (power of the Regulatory Authority to impose civil penalties) shall apply to any trustee or manager who has failed to take all such steps as are reasonable to ensure that it was so done.