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

Applicant	Mrs Angela Murphy
Scheme	The Vincent Murphy Co Ltd Nominated Directors' Pension Scheme (**the Scheme**)
Respondent(s)	Duncan Sheard Glass (**DSG**)

Subject

Mrs Murphy complains of maladministration by DSG, the Scheme administrator, has resulted in financial loss to her. Specifically, she says that the assets of the Scheme appear to have been split in a prejudicial manner to her late husband, John Murphy. She also says that DSG have used Scheme funds to provide a loan to one of their clients without disclosing this to the trustees and she has suffered a loss.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should not be upheld against DSG because it was Mr Murphy's decision to arrange the loan in question and they were not responsible for any financial loss to the Scheme. DSG also did not influence the asset split which Mr Murphy was aware of and agreed to.

DETAILED DETERMINATION

Material Facts

1. The Scheme was established on 26 March 1979.

2. The Scheme was set up for the benefit of John Murphy and his brother. Accounts for 2002 – 2006 show a significant increase in value from £595,518 in March 2005 to £888,876 in March 2006, largely due to property investment. This was confirmed by a letter from Ian Douglas of DSG, who wrote to Mr Murphy on 6 July 2005 informing him of the "increase in value of the properties". He also mentioned this in another letter of 1 May 2007.

3. Mr Murphy and his brother split the Scheme assets between them on 25 June 2006. Mr Murphy's share was valued at £888,876.

4. Later annual accounts of Mr Murphy's fund show a decline in Mr Murphy's fund value, presumably due to pensions in payment and a decline in property values. It should also be noted that Mr Murphy was in a drawdown arrangement.

5. Mr Douglas also wrote to Mr Murphy on 15 December 2008 warning Mr Murphy that "the economic climate…has taken a turn for the worse". The letter mentioned the concern that the recent increase in the pension payable would led to a decline in investment income. Mr Douglas suggested a review of the level of pension being paid.

6. Mr Murphy started negotiations around November/December 2009 to lend some of the cash in his fund to a client of DSG who needed funds to complete a residential development. The introduction had been facilitated by Ian Douglas of DSG. Mr Douglas subsequently became a trustee in the Scheme in February 2012. An email from Mr Murphy to Mr Douglas on 4 December 2009 confirmed that Mr Murphy had met with the proposed borrower. Mr Murphy said that he was expecting some proposals from the borrower's solicitor which he would pass to Mr Douglas on receipt. Mr Douglas says that he heard no more until Mr Murphy called him on 22 December 2009 about the loan.

7. However, Mrs Murphy has provided an email trail showing that the borrower's solicitor emailed loan proposals to Mr Douglas on 21 December 2009, which he then forwarded to Mr Murphy on the same day. Mr Douglas warned in the email that "this is a matter for the trustees". There was another email from Mr

Douglas to the borrower's solicitor on 22 December 2009 setting out the loan repayment terms. In an email to Mr Murphy on 15 January 2010, Mr Douglas confirmed receipt of the loan agreement and charge from the borrower. Mr Douglas said he had "read both and they are an industry standard and would imagine that there is no reason why they should be further read or commented upon by a solicitor. Obviously this is your choice and no doubt you will advise". Mr Murphy signed the agreement and went ahead with the loan. The loan started in January 2010 for a two-year term with interest at 20% for the first year and 2% a month thereafter.

8. The warning about the falling property valuation and the level of pension being withdrawn was repeated in another letter from Mr Douglas dated 10 December 2010.

9. Mr Murphy died on 29 November 2011. In the meantime, Mr Murphy's fund values had continued to fall and it was £403,989 at his death. The income drawdown review carried out at the time by Barnett Waddingham showed that Mrs Murphy could take a maximum drawdown of £25,275 a year.

10. Sometime after Mr Murphy passed away, Mrs Murphy says that she was informed during a visit from DSG that she could expect a pension of about £30,000 a year. This was revised to about £24,000 in April 2012. In June 2012, Mrs Murphy found documents relating to the loan. She says that DSG (and Mr Douglas) had not previously told her about the loan and Barnett Waddingham (scheme actuary and professional trustee of the Scheme) were also unaware of it. Mrs Murphy says that she made enquiries and found out that the owner of the development was a client of Mr Douglas. She also says that the borrower's solicitor was also a friend of Mr Douglas. She asked her solicitors to look into the matter.

11. On 7 January 2013, the Barnett Waddingham (on behalf of the trustees) wrote to the borrower's solicitor formally requesting full repayment of the loan. The loan should have been repaid by 26 January 2012. They subsequently appointed Mrs Murphy's solicitors to assist in the recovery. In their email to Mrs Murphy's solicitors on 11 January 2013, Barnett Waddingham said that they were initially unaware of the loan but it met HMRC requirements as an acceptable investment. They admitted that "had the investment not been made then the trustees would only have received nominal interest from holding the money on deposit". They said that they had only become aware of the loan a week earlier and discussed it

with Mr Douglas. They said that Mr Douglas believed that repayment by the borrower would be funded by an injection of capital and the offer would be in full and final settlement.

12. On 30 January 2013, Mr Douglas sent an email to Mrs Murphy's solicitors and Barnett Waddingham suggesting that, in the light of the borrower not being able to honour the agreement, a settlement of £55,000 would be acceptable. It is not clear on whose behalf he made this suggestion.

13. On 15 February 2013, following negotiations, the borrower agreed to repay the loan of £50,000 and interest of £11,000 by instalments over three months.

14. Mrs Murphy instructed new solicitors, Turner Parkinson, and they wrote to DSG on 11 April 2013 asking for documentation regarding the Scheme. DSG replied on 19 April saying that a full reply would be provided in the next seven working days. Turner Parkinson chased a response on 23 April. DSG replied on 29 April asking for more time. The trustees of the Scheme engaged solicitors, Brabners, to respond on their behalf on 5 June 2013.

15. Mrs Murphy remained dissatisfied with the response from DSG and brought her complaint to this office. In addition, she says that lack of information from DSG has made it necessary for her to instruct solicitors and incur costs.

Summary of Mrs Murphy's position

16. Mrs Murphy is unhappy with the Scheme split between Mr Murphy and his brother. She does not think that Mr Murphy would have agreed to the investments made on his behalf. She also believes that DSG allowed Mr Murphy to drawdown his pension at an unsustainable rate which has depleted the capital value.

17. She considers that DSG have behaved improperly in arranging the loan to one of their clients in what amounted to a conflict of interest and she believes that all knowledge of it was deliberately kept from her. She had to initiate steps herself to recover payment.

18. She would like the remainder of the unpaid loan interest paid to her by DSG. She would also like her current solicitor's fees to be paid by DSG as their intervention would not have been necessary had DSG provided proper information at the outset.

19. Mrs Murphy says that DSG should have advised Mr Murphy to seek independent advice at the outset; informed all the trustees of the proposed loan; disclosed to all trustees that the borrower was a client of DSG and provided a clear indication of the risks involved. Conduct of the nature shown in this case should be discouraged and penalised to ensure the highest standards are observed by those who have custody of pension scheme funds.

Summary of DSG's position

20. DSG say that it was Mr Murphy's decision to invest in property and arrange the loan of £50,000. The decline in his fund value, as compared to that of his brother, was due to conditions in the property and investment market. DSG have provided documents, including minutes of a trustee meeting on 5 June 2007, showing that Mr Murphy, as member trustee, made his own investment decisions and arranged the loan. Included is also a letter from DSG to Mr Murphy on 15 December 2008 and 10 December 2010 which set out their concerns about declining investment income due to the increase in pension payable and declining property values.

21. With regard to the loan, Ian Douglas of DSG says that he introduced the idea to Mr Murphy after he expressed an interest in earning a greater return on the case in his fund. Mr Douglas says that he made an introduction and that Mr Murphy handled everything else, including the due diligence, on his own. DSG did not get any payment for the loan being advanced.

22. DSG say that Mr Murphy selected his own property investments. His pension depended on the maximum allowed by drawdown legislation and the liquidity of his fund.

23. DSG say that they were aware the loan was in default but considered that the best return would be achieved by waiting for the borrower to sell the property development. Mrs Murphy made the decision to call in the loan and accept the reduced interest on offer rather than extending the loan in the hope of more proceeds.

Conclusions

The Loan

24. It is my view that the complaint raises potential procedural issues of a conflict of interest by DSG. It was poor practise for DSG to be involved in the loan

arrangements, knowing full well that both parties were clients. The borrower was a client of DSG and the relationship between the borrower's solicitor and DSG is unclear. Bearing this in mind, I am surprised that DSG did not advise Mr Murphy to take independent legal advice instead of suggesting the opposite. DSG also do not appear to have alerted the other trustees and/or Mrs Murphy when the loan went into default. There were opportunities for DSG to have informed the other trustees, particularly when the loan fell into default.

25. However, I have not seen any evidence that there was any deliberate intention by DSG to withhold knowledge of the loan from the trustees and/or benefit from doing so. Although DSG should have involved the other trustees in the loan arrangement, Mr Murphy was a trustee and had the same responsibility. More importantly, Mr Murphy was the beneficiary and probably viewed the fund as his to do with as he wished within HMRC restrictions. I also note that DSG mentioned to Mr Murphy on 21 December 2009 that the trustees should be involved in the loan arrangement but there is no indication that Mr Murphy took any steps to do so. Mrs Murphy appears to have ignored this fact in her complaint.

26. In any event, there is no evidence that the loan was not in the interests of the Scheme. In fact, Barnett Waddingham accept that the investment was a permitted investment and provided a return higher than what would have ordinarily been earned. I appreciate that Mrs Murphy is disappointed in her expectation of the return, but it was ultimately Mr Murphy's decision to proceed with the loan and not DSG. Mrs Murphy's loss (if indeed there is any) would appear to be one of expectation, but not one that DSG was responsible for. DSG were also not responsible for the loan falling into default. Mr Murphy would have been aware that investments carry risks and property investments are not immune from this. He had invested in property prior to the loan, so he was aware of the nature of such investments.

27. I appreciate that Mrs Murphy considers that she is entitled to the remainder of the loan interest but she accepted an offer in full and final settlement of the agreement. DSG were also not a party to the loan and I see no basis on which they can be held accountable for the unpaid interest. Her claim was properly against the borrower and not DSG. Mrs Murphy also cannot have it both ways.

She is unhappy about the circumstances surrounding the loan agreement. At the same time, she would like to enforce the agreement and benefit from it.

The Split

28. There is no evidence that DSG were responsible or influenced the split of the Scheme between Mr Murphy and his brother. While there is no record of how the split was agreed, there is also no indication that Mr Murphy was unhappy with it. Mr Murphy had a larger share after the split and was actively involved in investing his share. By all accounts, and as demonstrated by Mr Murphy's arrangement of the above loan, Mr Murphy took control of his own investment decisions. Mr Murphy was aware of the manner of the split and there is no evidence to support the view that he made the decisions he did under the undue influence of DSG.

29. Mr Murphy invested in commercial property while his brother took a different strategy. Accordingly, a comparison between their fund values is of no relevance. Mr Murphy's fund value rose sharply 2005-2006 due to rising property prices, and that equally appears to be a contributing factor to the declining values. That is the nature of investment (and property is not immune from this) – values can rise as well as fall.

30. This office does not provide an actuarial service so we are unable to audit the Scheme in the manner that Mrs Murphy would like. Mrs Murphy should rather approach the trustees with any concerns. With regard to instructing solicitors, our service (and that of the Pensions Advisory Service) is free and Mrs Murphy could have used either service without incurring legal costs. I appreciate that DSG delayed responding to her enquiries but there were other alternatives available to Mrs Murphy without necessarily instructing solicitors. Having done so, she is responsible for the costs arising from her decision.

31. I do not uphold Mrs Murphy's complaint.

Jane Irvine
Deputy Pensions Ombudsman

23 January 2015