

Ombudsman's Determination

Applicant	Ms V
Scheme	AJ Bell SIPP (the Scheme)
Respondent	AJ Bell Management Ltd (AJ Bell)

Complaint summary

1. Ms V's complaint is about AJ Bell's decision not to award her any death benefits under their discretionary powers in respect of Mr Philip Scott's Self Invested Personal Pension (**SIPP**).

Summary of the Ombudsman's determination and reasons

2. The complaint should be upheld against AJ Bell because their decision not to exercise their discretion in Ms V's favour was flawed.

Detailed Determination

Relevant Provisions of the rules of the Scheme

3. The relevant rules of the Scheme are contained in the Master Deed and Rules dated 5 April 2006 (**2006 Rules**).

4. Rule 7 of the 2006 Rules, refers to the payment of a dependant's pension and says:

“Following the death of a Member, the Scheme Administrator may pay pensions to or for the benefit of one or more persons each of whom is a Dependant of the Member...The Scheme Administrator may provide benefits under this Rule 7 by means of one or more insurance policies, which will form part of the Member Fund and will be distributed along with the remainder of the Member Fund in accordance with these Rules.”

5. Rule 8 of the 2006 Rules, refers to the payment of the lump sum death benefit on the death of a member. Rule 8.2 says:

“The Scheme Administrator may pay or apply such lump sum ... to or for the benefit of one or more Eligible Recipients in such proportions as they think fit. The Scheme Administrator may pay all or any of the lump sum ... to benefit one or more Eligible Recipient or may direct all or any of the lump sum to be held by themselves ... for the benefit of one or more Eligible Recipients as the Scheme Administrator thinks fit.

6. An “Eligible Recipient” is defined in the 2006 Rules as:

“in relation to a person are on the basis of reasonable enquiries made by the Scheme Trustee or the Scheme Administrator, his Spouse...his Dependants, persons interested in his estate...and persons...whom or that he has nominated to the Scheme Trustee or Scheme Administrator in writing ...”

7. A dependant is defined under the 2006 Rules as having the same meaning as in paragraph 15, Schedule 28 of the Finance Act 2004.

8. Section 15, Schedule 28 of the Finance Act 2004 defines a dependant as:

“(3) A person who was not married to, or a civil partner of, the member at the date of the member's death and is not a child... in the opinion of the scheme administrator, at the date of the member's death-

(a) the person was financially dependent on the member,

(b) the person's financial relationship with the member was one of mutual dependence, or

(c) the person was dependant on the member because of physical or mental impairment.”

9. Clause 46 of the 2006 Rules says:

“The Scheme Trustee, the Scheme Administrator and any Service Provider shall be entitled to all the indemnities conferred on the trustees by law. Neither the Scheme Trustee, nor the Scheme Administrator...shall be liable for any acts or omissions not due to their own deliberate bad faith and each Member in respect of whose Member Fund any relevant liability arises shall keep the Scheme Trustee, the Scheme Administrator...indemnified against any loss, liability, obligation, demand, claim, expenses or proceedings whatsoever (together referred to in this Deed and the Rules as the “Consequences”) of the exercise of all the Scheme Trustee’s, the Scheme Administrator’s...powers and discretions, and against the Consequences of any breach of trust or other breach of duty...except to the extent attributable to deliberate bad faith on the part of the Scheme Trustee, the Scheme Administrator...”

10. Section 61 of the Trustee Act 1925 provides:

“If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust ... but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the manner in which he committed such breach, then the court may relieve him wholly or partly for the same.”

11. The Deed of Substitution and Amendment dated 5 April 2007, provides that AJ Bell take over all of the powers of Sippdeal Trustees Ltd (the **Trustees**), in relation to the Scheme apart from the duty and power to hold Scheme assets.

Material facts

12. Ms V and Mr Scott had been partners for four years prior to Mr Scott’s death in July 2012. He had set up the Scheme, a SIPP, with AJ Bell in April 2009.

13. Mr Scott had nominated himself as sole beneficiary of the death benefits under the Scheme in an undated nomination form which AJ Bell received in 2009. The form allows the administrator of the Scheme to pay any death benefits to the persons named in it.

14. Mr Scott and Ms V had bought a house together in August 2009. Ms V owned 90% of the house and Mr Scott owned 10%.

15. Mr Scott made a Will in March 2010 and Blackadders Solicitors (**Blackadders**) were the executors of the Will. He was a partner of Blackadders LLP, which used Blackadders as a trading name. He retired in March 2011, but had not drawn any benefits from the Scheme at the date of his death.

16. In a letter dated 24 August 2012 to AJ Bell, Blackadders said:

“His will, made in 2010, shortly after he and Ms V had set up home together, contained certain provisions for all of them. He had mentioned to me in conversation earlier this year that he was thinking about updating his will and would be in touch with me, but had not been specific as to his intentions.

Sometime previously he had raised with [Mr C] the question as to whether he could nominate his partner to receive benefits.

As recently as 24 May 2012, [Mr C] had written to Mr Scott advising him of the death benefits available in respect of his various plans and the options that were open to him. It was clear at that stage that Mr Scott knew that he needed to make decisions about his pension plans. After he had received the information which he had requested he had been abroad on holiday for several weeks and just after he returned he was involved with a family bereavement. As you may know Mr Scott’s own death on 9th July was very sudden and completely unexpected.

His partner had already made arrangements to nominate Mr Scott as the person entitled to her death in service benefit and pension should she pre-decease him. (Being a member of the NHS Scheme her decisions were easier to make and implement). We know that Mr Scott was intending to make similar provision for her from his plans, but events overtook him.”

17. Ms V had brought a previous complaint to us against AJ Bell regarding the Scheme, which was finally determined on 11 March 2014. The decision was to uphold that complaint on the grounds that AJ Bell had no basis for reaching the conclusion they did. Consequently, AJ Bell were to ask Ms V for evidence of her dependency on Mr Scott and, following receipt of this information, decide whether and to what extent discretion should be exercised in her favour.
18. Ms V provided AJ Bell with evidence of her dependency on Mr Scott. There was a meeting of the committee of the AJ Bell board of directors (the **Committee**) on 17 December 2014, to consider exercising their discretion in relation to an award of death benefits in relation to Mr Scott. The relevant points in minutes of the meeting are as follows:
- a. Mr Scott had completed a nomination form which they received in April 2009, around four months before he and Ms V purchased the jointly owned property. As the nomination form had been signed by him, it was a factor that could be taken into account in relation to the exercise of the discretion.
 - b. Mr Scott had nominated himself which was unusual. However, there was no technical reason why he could not do so and the effect of such a nomination, if it were followed, would mean that the benefits are paid to his estate.

- c. Ms V's pension provider the Scottish Public Pensions Agency accepted that she and Mr Scott were financially dependent. But this does not mean that she was necessarily a dependant for the purpose of the Scheme, as the rules of the NHS Scheme appear to be different. Even if they were identical that did not necessarily mean that the outcome would be the same: because different people when considering the same facts could, in exercising their discretion, quite properly reach a different conclusion provided it was within the range of decisions that a properly directed body of trustees could reasonably make.
 - d. Mr Scott had given Ms V the right to remain living in the jointly owned property, or any replacement property that was purchased with the proceeds of the sale, for as long as she wished. There was no requirement for her to pay any rent, provided she paid all related occupational and maintenance costs, but that once she ceased to do so his interest would pass to his children as part of his residuary estate.
 - e. Since his death, Ms V has purchased Mr Scott's interest in the jointly owned property.
 - f. Details of Ms V's current income and expenditure were requested, to give an insight as to whether or not receiving Mr Scott's pension entitlement had caused, or was likely to cause, her any material degree of hardship. If it was decided that she had been a dependant that was a factor which they might wish to take into account when exercising their discretion as to whether to pay a pension or lump sum. However, it was not relevant to the determination as to whether she was a dependant of Mr Scott in the first place, as it was the circumstances at the date of death which should be taken into account when that decision was made.
 - g. It was agreed that they should contact Blackadders to obtain clarification on the wording of the letter of 24 August 2012 and their understanding of Mr Scott's intention when he nominated himself as beneficiary of the SIPP.
19. On 20 January 2015, in response to enquiries from AJ Bell, Blackadders said:
- a. Having re-read the letter of 24 August 2012, the last sentence in the penultimate paragraph was incorrect. What they had intended to say was that they did not know whether Mr Scott was considering making any provision for Ms V from his pension.
 - b. Mr Scott never said anything about his intentions as far as the Scheme was concerned. He had mentioned that he was thinking about making provision for his grandchild. He never mentioned his pension.
 - c. The fact that Mr Scott had nominated himself as beneficiary of the Scheme was surprising. All previous correspondence and considerations have been on the understanding that he had never made any nomination.
 - d. This puts the decision of AJ Bell in a completely different context – they were exercising their discretion on the basis of an existing nomination. They would

need explicit and clear justification for departing from the nomination, which does not appear to be the case.

20. The Committee had a meeting on 27 January 2015, to reconsider exercising their discretion in relation to the death benefits payable on the death of Mr Scott. Their decision was as follows:
 - a. The extent of the sharing of living expenses provided was on balance sufficient to establish that Ms V was in a financial relationship with Mr Scott at the date of his death, so she was a dependant at that date.
 - b. Ms V was an “Eligible Recipient” as at the date of Mr Scott’s death, as were his children, grandchild and, in light of the nomination which they considered to be a valid expression of his wishes, notwithstanding that it was undated, his estate.
 - c. Although the nomination was made just over three years prior to Mr Scott’s death and four months before he and Ms V bought the jointly owned property, there was no suggestion that this was a case where a member made a nomination, his circumstances subsequently changed and he overlooked the need to review the nomination prior to his death.
 - d. Although Ms V had indicated that Mr Scott had agreed to make a nomination in her favour, she had already changed her pension scheme nomination in his favour shortly after they had satisfied the requirement of having to live together for at least two years. It is clear that Mr Scott was considering making changes to his nomination, but it is not clear that he had made a final decision as to whether to make a nomination in favour of Ms V.
 - e. In light of the above points, and as the extent of contribution Mr Scott made to their shared living expenses was not such that Ms V would in their opinion suffer from a material fall in her living standards, there was not considered to be sufficient reason for overriding the nomination made by Mr Scott prior to his death and the death benefits should be paid to his estate. Neither a pension nor lump sum benefit should be paid to Ms V.
21. On 3 February 2015, AJ Bell wrote to Ms V informing her that even though she was considered to be both a dependant of Mr Scott and an “Eligible Recipient” at the date of his death, they concluded that the discretion to award the death benefits should not be exercised in her favour. They said that the principle reason for their decision was because they considered that there was insufficient evidence as at the date of death to establish that he had decided to make a nomination in her favour.
22. Ms V could not resolve her complaint with AJ Bell so she brought her complaint to us.

Summary of Ms V’s position

23. She says:

- a. There is no reference to any decision making by AJ Bell in relation to whether she was eligible for a dependant's pension under the rules of the Scheme.
- b. AJ Bell followed a flawed process in exercising their discretion in breach of their legal duties because:
 - i. The minutes of the 24 January 2015 meeting show the over-reliance AJ Bell had placed on the need for a nomination form to be in place in favour of a person before they can exercise their discretion in that person's favour.
 - ii. The existence or otherwise of a nomination form is only one aspect of the decision-making process. They must go through a proper process of information gathering and investigation when exercising their discretion. The January 2015 minutes do not show any investigation into other persons who may fall within the class of persons who may be considered for death benefits under the Scheme. Instead, the minutes show that they had focussed on whether there was any material fall in her living standards as a result of Mr Scott's contribution to their joint finances ceasing to exist, as a reason or otherwise, to depart from the nomination form received in 2009.
 - iii. Even if AJ Bell were correct to focus solely on this aspect, the figures she supplied to them in May 2014, when considering her status as a dependant, showed that Mr Scott contributed 89% of their joint household expenses.
 - iv. The fact that there were very material changes in Mr Scott's financial and domestic arrangements since the original nomination form was received by AJ Bell and, moreover, that this could render the nomination form to be out of date, does not feature in their decision-making process.
 - v. While it does not appear that AJ Bell did take into account the further evidence set out in Blackadders' letter at the January 2015 meeting, she would question the worth of that evidence. Both Mr Scott's son and daughter had confirmed to her that Blackadders had acted for them in a personal capacity and therefore Blackadders' correspondence and comments on her position must be read in that context.
 - vi. The minutes of the January 2015 meeting show that AJ Bell had little or no regard to two quite separate discretions to exercise, namely, the discretion to award a lump sum and the discretion to award a dependant's pension. They appear to base the whole decision-making process on the award of the lump sum death benefit, whilst concluding that the decision made related to both the lump sum and dependant pension benefits.
 - vii. As Mr Scott's sole dependant, she had the right to be considered for the separate dependant's pension. Contrary to trust law and the rules

of the Scheme, there was nothing in the minutes of the January 2015 meeting to show that they did go through any distinct and proper process for considering her for a dependant's pension.

- viii. AJ Bell say that the nomination form formed the basis of consideration of a dependant's pension as well as a lump sum benefit. However, they also say that a nomination for a dependant's pension is required before they can consider this. There is no mechanism under the rules of the Scheme for a member to nominate a person for the dependant's pension and, moreover, the form completed by Mr Scott does not in any part state that it refers to a nomination for the dependant's pension.

Summary of AJ Bell's position

24. It is clear from the definition of "Eligible Recipients" that a person whom the deceased member has nominated in writing is included within the class of "Eligible Recipients". However, there is no obligation on them to pay the lump sum death benefit to a person nominated by the deceased member or to a dependant of the Scheme member.
25. Mr Scott's nomination is a relevant and important factor to be taken into account in the exercise of discretion to distribute the lump sum death benefit in this case, as it is an expression of his wishes.
26. Mr Scott had nominated himself to receive 100 per cent of the lump sum death benefit. The nomination was for the lump sum to be paid to his estate. That would mean that the persons who would benefit from the lump sum benefit would be the relevant beneficiaries under his Will, who are his children and grandchild.
27. The decision not to award Ms V a dependant's pension or any lump sum death benefit was neither unreasonable nor perverse, but was in the particular circumstances within the reasonable range of decisions that a reasonable decision maker could properly reach. They took account of all relevant factors, including Mr Scott's nomination form, when exercising their discretion.
28. They approached their decision by identifying who were Eligible Recipients and, having done so, then considered how they should distribute the death benefits amongst them.
29. They considered Ms V for both the award of a dependant's pension and a lump sum death benefit, but concluded that in the circumstances there were not sufficient grounds for them not to follow the nomination made by Mr Scott prior to his death.
30. Under HMRC death benefit rules a registered pension scheme is permitted to pay out benefits following the death of a scheme member either as a pension or as a lump sum benefit. The nomination form which Mr Scott completed applied to death benefits generally, not just the lump sum benefits.

31. The decision as to whether to award death benefits to a nominee if a nomination is followed by way of a dependant's pension, if the nominee is eligible, and/or a lump sum, is a further discretion that is reserved to them. When following a nomination it is their normal custom and practice to ask a beneficiary who is eligible for both types of death benefits if they have a preference before that discretion is exercised.
32. They took into account the sharing of living expenses between Mr Scott and Ms V at the date of the former's death, but did not consider it to be sufficient reason for overriding the nomination.
33. They wrote to Blackadders, in April 2014, asking for details of any dependency on the part of other individuals on Mr Scott. Blackadders confirmed that neither of his children was financially dependent on him. Blackadders also stated that whereas Mr Scott had retired and had not worked in the 15 months prior to his death, Ms V was still working as a general practitioner throughout that period.
34. They were aware that Blackadders were acting for the executor of Mr Scott's estate. However, they are unable to confirm whether or not Blackadders were acting for the beneficiaries of that estate personally.

Conclusions

35. The decision as to the distribution of the lump sum death benefit under the Scheme is an absolute discretion to be exercised by AJ Bell. The relevant legal principle is by now well-established. I may only interfere with the exercise of a discretion if AJ Bell have acted improperly in reaching their decision in that:
 - a. they failed to take into account all relevant factors or took into account irrelevant factors;
 - b. they asked themselves the wrong questions;
 - c. they misdirected themselves on a point of law, for example, by adopting an incorrect interpretation of the relevant rule; or
 - d. they arrived at a perverse decision, i.e. a decision no reasonable decision maker, properly advising himself of all the relevant circumstances, could reach.
36. There is no dispute that Ms V was an "Eligible Recipient" under the 2006 Rules. I would agree that just because a person is a dependant it does not mean that they should automatically be awarded the death benefits. However given that she was identified as an "Eligible Recipient", I would expect Ms V to be given equal consideration as Mr Scott's children, grandchildren and his estate.
37. The questions AJ Bell needed to ask themselves were: who were "Eligible Recipients" for the lump sum death benefit and how should the benefit be distributed amongst them (i.e. in what proportion and whether a pension or a lump sum should be paid)? AJ Bell agree that Ms V was a dependant and an "Eligible Recipient".

However, the principle reason they gave for deciding not to exercise their discretion in her favour was because there was insufficient evidence to establish that at the date of his death Mr Scott had decided to make a nomination in her favour. The fact that she was a dependant should have been sufficient without the need to consider whether or not Mr Scott would have nominated her for the lump sum death benefit.

38. AJ Bell say that their approach is to identify who were the “Eligible Recipients” and then consider how the death benefits are to be distributed. Therefore, having identified Ms V as an “Eligible Recipient”, they should then have gone on to consider whether she should receive all or any part of the death benefits. However, what they considered was whether Mr Scott would have been nominated her for the death benefits.
39. The way AJ Bell have considered this matter indicates to me that, in effect, the questions they actually asked were: what were Mr Scott’s wishes and could they comply with these? These were not the correct questions. Mr Scott’s wishes were but one factor to be considered by AJ Bell; albeit a valid and important one. AJ Bell were not and should not have allowed themselves to be bound by those wishes.
40. I therefore find that there was maladministration by AJ Bell in that their decision whether or not to exercise discretion in Ms V’s favour was flawed. I therefore uphold her complaint.
41. There are some difficulties relating to any directions though. Normally in such circumstances I would simply remit the matter for AJ Bell to reconsider. However:
 - a. the only asset of the Scheme was the lump sum death benefit which has been paid out to Mr Scott’s estate and may or may not be recoverable;
 - b. Ms V’s previous complaint against AJ Bell was upheld and was remitted to them for reconsideration;
 - c. AJ Bell is a limited Company (whose directors legitimately remain behind the “corporate veil” and cannot be personally liable);
 - d. if AJ Bell were potentially liable (as a corporate entity) for such sum as has already been paid as a result of their first decision, and this sum is irrecoverable, then they could seek to rely on the Scheme’s exoneration clause. If successful there would be no assets with which to pay the lump sum if a new decision were different from the original decision;
 - e. to the extent that AJ Bell considers that they cannot, or should not seek, to rely on the exoneration clause (or that they cannot be relieved of liability for some other reason) there will be a considerable disincentive to reach a different conclusion on reconsideration.
42. Notwithstanding the above, I shall remit the matter to AJ Bell for reconsideration. If on reconsidering the matter they do so properly, then Ms V will have the satisfaction of

knowing that, whatever the outcome, her claim as an “Eligible Recipient” has been properly considered.

43. If the decision differs from that already made, AJ Bell will have to decide the extent to which the payment already made is recoverable. If it is not wholly recoverable, AJ Bell will then have to consider whether they are liable for the loss to the Scheme’s assets. If the decision is in Ms V’s favour, but she receives a smaller proportion because the assets are limited, then she may revert to my office for a further determination.
44. I recognise that Ms V has suffered significant non-financial loss in the form of distress and inconvenience arising out of the way in which AJ Bell dealt with her claim. I have therefore made a direction below for AJ Bell to pay her compensation to redress the non-financial loss she has suffered.

Directions

45. I direct that as soon as practicable and in any event within 28 days of the date of this determination, AJ Bell shall reconsider the distribution of the lump sum death benefit. As they have already decided who the “Eligible Recipients” are, they will now have to decide how the lump sum death benefit should be distribution between them.
46. I also direct that, within 21 days of the date of this determination, AJ Bell shall pay Ms V the sum of £1,000 as redress for the significant non-financial loss she has suffered.

Anthony Arter

Pensions Ombudsman
25 May 2016