

Written evidence from The Pensions Ombudsman NPS0004

Our role

1. The Pensions Ombudsman (**TPO**) is a non-departmental public body, funded by the Department for Work and Pensions (**DWP**) via a grant-in-aid recovered from the general levy on pension schemes that is administered by The Pensions Regulator (**TPR**). The legal framework within which we operate is contained in Part X of the Pension Schemes Act 1993 and the Pension Schemes (Northern Ireland) Act 1993, together with secondary legislation.

Introduction

2. TPO welcomes this opportunity to provide written evidence to the Committee's inquiry into the Norton Pension Schemes and the Fraud Compensation Fund.
3. As the Committee will be aware, TPO conducted an investigation into Stuart Garner's acts and omissions in relation to the three Norton Pension Schemes, where he was personally acting as the sole trustee of those schemes, having received several complaints from scheme members. The then Pensions Ombudsman issued his Determination (the **Determination**) in relation to those complaints on 23 June 2020¹.
4. TPO found that Mr Garner had committed multiple dishonest breaches of trust and maladministration, which had led to the loss of scheme members' pension funds, and determined that Mr Garner was personally liable to pay to the schemes a total sum of approximately £10.6 million plus simple interest at the rate of 8% per annum.
5. While Mr Garner did not seek to appeal against the **substantive** findings within the Determination, he sought permission from the High Court to appeal the directions set out in the Determination, on various grounds relating to quantum. Permission to appeal was granted in relation to one of those grounds (which concerned the amount awarded to each of the scheme members who had made a complaint to TPO in relation to non-financial injustice) and in relation to another ground on a restricted basis.
6. TPO applied to the Court for, and was granted, permission to participate in the appeal, noting that the Respondents to the appeal were not participating².

¹ <https://www.pensions-ombudsman.org.uk/decision/2020/cas-30918-m4p3/dominator-2012-pension-scheme-dominator-scheme-donington-mc-pension>

² Most of the respondents to the appeal were individual, lay members of the pension schemes, who had neither the financial means nor the expertise to participate in the appeal. The independent trustee also lacked the financial resources to participate, as the schemes and their employer had no assets.

TPO's participation led to Mr Garner's withdrawal of the appeal, so the Determination still stands and its finding of dishonesty should assist the Fraud Compensation Fund (**FCF**) in respect of related claims to it.

Executive Summary

7. In June 2020, TPO issued a Determination in which Mr Garner was found to have committed multiple dishonest breaches of trust and maladministration and was directed to pay approximately £10.6 million plus interest to the pension schemes. Mr Garner did not appeal the substantive findings within the Determination, but he appealed on grounds relating to quantum.
8. TPO's participation in the appeal led to Mr Garner withdrawing it, so the Determination still stands and the dishonesty findings should assist the FCF in considering claims relating to the schemes.
9. TPO notes that, as well as having used its powers to deter trustees from acting dishonestly, TPR has recently been granted additional powers and is working collaboratively with TPO with a view to preventing the dissipation of assets and progressing cases against dishonest trustees in a more efficient manner. TPO is keen to build upon this work further, with a view to TPR being able to exercise its powers in matters of common interest and/or pursuant to information revealed by a TPO investigation.
10. TPO considers that legislation alone is unlikely to prevent trustees from acting dishonestly, as such acts often occur covertly and in breach of legislation. However, there may be scope for increased regulatory requirements at scheme set-up. Other measures include increasing public awareness and working with other stakeholders to identify trends, which TPO is actively contributing to by, for example, attending Pension Scams Action Group (**PSAG**) meetings.
11. Broadening TPO's information sharing powers with other bodies that have Proceeds of Crime Act (**POCA**) powers, such as the police, could further help to prevent the dissipation of scheme assets or those in the possession of a dishonest trustee.
12. TPO considers that the FCF application process could be made more accessible by enabling scheme members to apply to TPR to appoint an independent trustee (**IT**) specifically to make an FCF application. Further, on the face of it, legislative amendments to enable the FCF to adopt TPO's findings of dishonesty may also assist the application timeline and the industry – although we are aware that the FCF is not of the opinion that such changes would materially accelerate the process.

The Committee's Questions

Question1: Does TPR have the powers it needs to prevent trustees acting dishonestly and in breach of their trustee duties, leading to the loss of pension scheme assets, as happened in the Norton case according to the Pensions Ombudsman?

13. TPR would be in the best position to confirm its views on this, for example, whether it requires greater powers, more resources or both.
14. However, in principle TPO would support greater powers in this respect, where any shortfall in TPR's ability to protect pension scheme members is identified. TPR has made use of its ability to take action to deter trustees from acting dishonestly, such as bringing a criminal prosecution against them. TPO notes that such action has been taken on a few occasions. Further, TPR has successfully prosecuted Stuart Garner on three counts of breaching the employer-related investment rules, which has resulted in his receiving a suspended sentence and a 3-year ban from acting as a company director.
15. TPO notes that TPR has recently been granted new powers, under the Pension Schemes Act 2021, which include the ability to investigate and prosecute trustees in respect of new criminal offences in relation to non-money purchase schemes, such as 'conduct risking accrued scheme benefits'. We note that these bring TPR's powers more into line with those available in relation to DC schemes where scheme assets are at risk.
16. TPR has also been working with TPO, where possible, with a view to using their respective powers collaboratively, for example to prevent the dissipation of scheme assets. More detail on this is set out in TPO's response to question 3 below.

Are the right regulatory arrangements [in place] to prevent a similar case happening again?

17. Dishonesty cases often occur under the radar and in contravention of legislative requirements, so it seems unlikely that they could be prevented by legislation alone. TPO considers there might be scope for greater regulatory requirements at the scheme set up and registration stage, which would overlap with HMRC's.
18. As an example of measures that are being taken in addition to exercising statutory powers, we note that the PSAG has been working to increase public awareness of the threat of pension scams and to bring the pensions industry together to identify and tackle pension dishonesty risks, and that there has

been significant engagement, by pension schemes, with TPR's 'Pledge to Combat Pension Scams' campaign.

19. TPO attends PSAG meetings to work together with the other agencies on identifying trends and preventing scams and meets individually with stakeholders HMRC and Action Fraud, in addition to our monthly meetings with TPR and FCF at case level.
20. In view of the difficulty in preventing all scams of this type, it is worth considering and should also be possible to put in place a regulatory framework, to the extent that it does not exist already, that limits the dissipation of scheme assets once the 'scam' is identified. This is explored further under question 3 below.

Question 2: Could different regulatory arrangements have delivered a faster resolution of the Norton case, or a similar case?

21. We consider that TPR would be better placed to comment on regulatory arrangements and resolution timelines, as TPO is dependent on a complaint being made to it in order to commence an investigation.

Question 3: How could co-ordination with other (non-pension) bodies be improved?

22. While TPO can issue binding Determinations that require individuals to make good the loss suffered by the scheme and its members, the very nature of the investigations that lead to such outcomes is that they take a considerable amount of time to complete. In that period those individuals can dispose of the assets that could have been used to meet the obligation to make good the scheme.
23. As a result, TPO is keen to achieve an outcome in which it has the ability to make use of powers, or 'piggy back off' the exercise of powers by other agencies, to obtain access to a trustee or administrator's premises in order to seize information or documents, or to prevent the dissipation of assets before the Ombudsman can issue a Determination requiring repayment of assets to the pension scheme. TPO considers that being granted the ability to exercise such powers, either alone or in concert with another organisation such as TPR or another non-pensions body, could greatly improve the outcome of pension dishonesty cases for scheme members.
24. While this question refers to co-ordination with non-pension bodies, we consider it relevant to mention TPO's collaboration with TPR and the potential for TPO to benefit from TPR's very wide range of investigative and enforcement powers, especially TPR's use of its powers under POCA.

25. While TPO has the power, under section 150(1)(b) of the Pension Schemes Act 1993 (**PSA 1993**), to require any other person, including other agencies, to provide information or documents for the purposes of TPO's investigations, that power can be ineffective in practice where another agency is prevented, under its own governing legislation or other legal constraints, from sharing or permitting access to information held by it (for example information may be 'restricted' so could not be used or referred to in a TPO Determination).
26. TPO has a widely framed discretion, under section 149(5) PSA 1993, to provide information obtained for the purposes of a TPO investigation to other organisations set out in section 149(6) PSA 1993 '*if the Ombudsman considers that the disclosure would enable or assist that person to discharge any of his functions*'. The organisations set out under section 149(6) PSA 1993 include TPR and the Financial Conduct Authority.
27. TPO and TPR have an information sharing agreement in place and have taken steps to broaden the remit of that agreement, with a view to sharing information before the Ombudsman's Determination is issued, where this might enable TPR to expedite the use of its freezing order power and/or the appointment of an independent trustee to protect remaining scheme assets.
28. Additionally, TPO is keen to build upon its work with TPR further, so that relevant powers could be exercised by TPR in a matter of common interest or pursuant to information unearthed by a TPO/ Pensions Dishonesty Unit complaints' investigation or Determination. Indeed, future co-operation could involve the co-ordination of the **timing** and **nature** of any TPO investigation/TPR regulatory intervention (as applicable)³. This would allow for a more streamlined approach in investigating cases and taking preventative or corrective action.
29. Currently, TPO has no information sharing channel with the police under s.149(5) or (6) PSA 1993, so it could only pass on information to the police in response to a request under section 115 of the Crime and Disorder Act 1998. However, broadening TPO's ability to share information with the police, or another body with POCA powers could enable that body to take action to freeze a respondent's assets, allowing that body to carry out its own regulatory actions more quickly while potentially preventing their dissipation before an Ombudsman Determination is issued.

Question 4: How could communications with scheme members of collapsed pension schemes be improved while at the same time protecting scheme assets?

³ It should be noted that each body's action would need to be taken in furtherance of their own statutory function(s) only.

30. At present, our experience suggests that independent trustees (for example, Dalriada) correspond with scheme members only after the scheme's assets have been frozen. We note that this tends to create suspicion amongst the scheme members, who sometimes complain to TPO of (usually unavoidable) delays in reconciling the scheme's accounts and in recovering members' pensions.
31. We consider that TPR would be better placed to comment as to whether it is feasible to notify members sooner without any action jeopardising the scheme's assets.

Question 5: How could the process for applying to the Fraud Compensation Fund (FCF) be simplified and sped-up?

32. We would suggest having in place a streamlined system allowing members to apply to TPR to appoint an IT to the scheme, specifically in order to make a FCF application. That IT could also facilitate a referral of a dispute/complaint to TPO in an effort to recover money directly from a dishonest trustee.
33. At present, while a member can initiate a FCF application, the FCF would need to contact the scheme's trustees, to obtain further information from them to progress the claim. TPO considers, from experience of investigating complaints of trustee dishonesty, that it is unlikely that many dishonest trustees would be easily contactable or willing to provide the necessary information to the FCF. Further, a trustee who has appropriated scheme assets, or facilitated their appropriation, would clearly be unwilling to fulfil the duty, placed on trustees by section 184 of the Pensions Act 2004, to "*obtain any recoveries of value, to the extent that they may do so without disproportionate cost and within a reasonable time*".
34. TPO understands that FCF is considering a method of asset assignment, similar to one used by the Financial Services Compensation Scheme, which would allow a claim to be made to the FCF (and a payout) before all recovery attempts have been exhausted, in particular where an illiquid asset is involved. TPO would support this.
35. Given the very close correlation between the nature of TPO's Pensions Dishonesty Unit's findings and the parliamentary intent behind the creation of the FCF, one would imagine that if their bringing into existence had been in contemplation at the same time then the ability to adopt the other's decisions to short circuit the process would have been instituted. TPO considers that an amendment to legislation now to that effect may assist the timeline and the industry⁴.

⁴ At present, the tests required and applied for FCF compensation and TPO's findings of trustee dishonesty differ.

Question 6: What claims might the FCF expect in future and are there schemes which might be eligible but do not have the support to make a claim.

36. TPO considers that the FCF should expect, as a minimum, to receive a claim from any pension scheme in respect of which the Ombudsman has issued a Determination finding that any of the scheme's trustees have caused a reduction in scheme assets by acting dishonestly. TPO's Pensions Dishonesty Unit is currently investigating member complaints and/or trustee referrals regarding dishonesty in respect of thirty-six pension schemes. While some of these cases might not progress to a full TPO investigation, they may still require a referral to the FCF. TPO, FCF and TPR meet monthly to discuss the progress of cases and share information on those likely to proceed from one to another of the bodies (eg. TPO to FCF).
37. However, not all pension schemes that the Pensions Dishonesty Unit has investigated or is investigating have an independent trustee, who could progress an FCF application, in place.
38. Where TPO conducts an investigation and reaches a point where it considers there is a strong likelihood of a direction for financial compensation to the scheme being made, TPO liaises with TPR with the aim of securing an IT appointment to protect any money recovered and to facilitate any subsequent claim to the FCF.

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