HEAD OFFICE
Johannesburg
1st Floor, Norfolk House
Cnr 5th Street & Norwich Close
Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town
2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 ("the Act"): CV Wilding v Lifestyle Retirement Annuity Fund ("the fund")/ Liberty Group Limited ("insurer")

Introduction

1. This matter concerns the charging of a fee for cessation of contributions in a retirement annuity fund. Your complaint was received by this office on 3 October 2005. On 19 October 2005 a letter was sent to the respondent with your complaint giving it until 11 November 2005 to file a response. A response was received from the respondents on 18 May 2006.

2. In December 2005 an announcement was made of a Statement of Intent between the Minister of Finance, on the one hand, and the Life Offices Association and five large life assurers on the other, in terms of which the life assurers would commit themselves to certain minimum standards in respect of retirement annuity funds and endowment policies. Although the statement is not binding on this office, we nevertheless referred all retirement annuity fund complaints (including this one) back to the management boards and life assurers administering these funds with a view to facilitating an amicable resolution of the complaint between the parties without the intervention of this office. This matter was referred for settlement to the insurer on 24 January 2006. The parties were given 30 days to settle the matter failing which this office would determine the complaint in the ordinary course. Many complaints were settled on this basis but the settlement terms were not divulged to this office. However, on 25 April 2006 you informed this office telephonically that you have not received anything from Liberty, and I should proceed to determine this matter. It is with that brief background that I now determine this complaint in the ordinary course.

3. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and the reasons therefor appear below.

Complaint

4. You became a member of the fund on 1 April 1995 whereupon the insurer, both the administrator and underwriter of the fund, issued a policy of insurance on your life. Your chosen date of retirement was 1 April 2022.

5. On 1 November 2000 you ceased contributions to the fund.

6. Your complaint is that when you ceased contributions, a charge of R13 351.06 was deducted from your investment account. You submit that this charge is excessive in relation to the contributions paid (R37 424).

Respondents' response

7. In its response, the fund encloses the membership certificate including the policy contract, the fund rules, a document entitled "Overview and background" and a letter from the insurer addressed to the fund.

8. I shall not deal with the contents of the "Overview and background" document in great detail because it is intended to provide a general overview of the relationship between the fund and Liberty Life only and is not specific to your complaint. I shall deal with the insurer's letter in greater detail since its content is peculiar to your complaint. In what follows, the insurer and fund are referred to collectively as "the respondents".

9. The respondents have raised a technical point that since your complaint concerns the operation of the underlying policy of insurance, I have no jurisdiction to determine this matter.

10. On the merits, the respondents state that when you ceased contributions early, a "premium cessation charge" was deducted from your investment value. Their explanation is that the "premium cessation charge" is levied to enable the insurer to recover the expenses it has already incurred but which it can no longer recover by way of the normal charges when a member stops contributions early. (When you ceased contributions, the policy still had more than 21 years to go to maturity).

11. The respondents submit that the actual outstanding expenses on your policy contract at the "paid-up" date were R26 728.54 made up as follows:

"Commission	R14 080.80
Marketing, distribution costs, plus VAT, if applicable	R 3 520.20

Acquisition expenses	R 3 997.55
Ongoing Renewal costs	R 1 723.78
Finance charges on outstanding expenses	R 6 140.92
Less Expense Recovered to date	R 2 734.71
Total unrecovered expenses at 01/11/2000	R26 728.54"

12. The actual charge deducted from your fund value as a "premium cessation charge" was however R13 351.06. (The respondents do not explain the reason for this despite my assistant's letter dated 22 June 2006 addressed to Liberty Life in this regard).

13. The respondents have referred me to clause 5 of the policy document. (I note in this regard that clause 5 has been misquoted in the response). Clause 5 reads:

> "**PAID UP BENEFITS**
> If at any time the Asset Value of the Contract exceeds R300 the Contract may be Paid Up, in terms of which:
>
> (a) no further contributions shall be payable, and
> (b) all benefits otherwise payable shall be reduced accordingly and
> (c) any right to Disabilty (sic) Benefits or other Supplementary Benefits shall cease.
>
> The reduced benefits shall continue to participate in surplus."

14. The respondents have also referred me to rule 5.2 of the fund's rules as authority to deduct a "premium cessation charge". Rule 5.2 reads:

> "If a MEMBER prematurely discontinues his CONTRIBUTIONS to the Fund, then provided CONTRIBUTIONS have been paid for the minimum period required in terms of the insurance on the MEMBER'S life he will be entitled to paid-up BENEFITS under the Fund for an amount determined in relation to the actual CONTRIBUTIONS paid."

15. According to the respondents "an amount determined in relation to the actual contributions paid" refers to the policy value determined by the insurer in accordance with the actuarial rules *after taking unrecovered expenses into account*.

16. The respondents have also referred to clause 4 under the heading "Summary of Investment Provisions" in the policy contract which reads:

> "4. ASSET VALUE
> The Asset Value shall be the Value of the Investment Account reduced by an amount in respect of unrecouped expenses, determined by the Actuary of the Assurer."

<u>Determination and reasons therefor</u>

Technical points

17. There is no merit in the technical points raised by the respondents because the crux of this complaint does not constitute long term insurance business, but actually relates to a retirement annuity fund, which is a pension fund organization as defined in the Pension Funds Act. For the reasons more fully set out in *JJ Schwartz v Central Retirement Annuity Fund & Another* [2005] 5 BPLR 435 (PFA) at paragraphs [12] to [28] and *Louw v Central Retirement Annuity Fund & Another* BPLR [2005] 7 BPLR at paragraphs [17] to [36], I cannot uphold the contention that this matter constitutes "long term insurance business" over which I have no jurisdiction.

18. Furthermore, Davis J (in whose judgment Le Grange AJ concurred) in the as yet unreported decision in *Central Retirement Annuity Fund v Adjudicator of Pension Funds, [2005] 8 BPLR 655 (C*), ("the de Beer judgment") at page 660, confirmed the jurisdiction of this office and stated:

> "The Rules of the Fund set out its essential purpose as being to provide benefits to members upon retirement. The fact that applicant may be exempt in terms of the applicable law from audit cannot exempt it from playing a role in the fulfillment of its purpose. In any event, applicant is a pension fund organization and has separate legal personality in terms of s51(a) [sic] of the Act. It cannot simply be treated as an illusionary 'go between' the members such as second respondent and Sanlam Life. It should be accountable to its members and hence be subject to the discipline of the Act's complaint mechanism."

Merits

19. As the Supreme Court of Appeal stated in *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28]), the trustees may only do with the fund's assets what is set forth in the rules. If what they propose to do is not within the powers conferred on them by the rules, they may not do it. That the rules of a fund are king is confirmed by section 13 of the Act. It is against this backdrop that I must determine whether the rules or the policy document authorized the deduction of any charge from your investment value when you ceased your contributions.

20. Clause 5 of the policy document (see paragraph 13) to which the respondents refer provides that when contributions cease (and the Asset Value of the contract exceeds R300), the policy shall be made paid up and the benefits payable shall be reduced accordingly. The respondents omit to state the relevance of clause 5. It is in any event too vague to be of assistance to their case. There is no definition of a "paid up" policy. There is also no indication of how the benefits are to be reduced or on what basis. Clause 5 certainly does not confer authority to charge a "premium cessation charge" when a member ceases contributions.

21. Rule 5.2 of the fund's rules (see paragraph 14) to which the respondents refer provides that when a member ceases contributions, he shall be entitled to

paid-up benefits for an amount in relation to the actual contributions paid. It stands to reason that when a member stops paying contributions early the benefit payable will be less than the benefit payable had contributions been paid until the chosen date of retirement. But that is as far as rule 5.2 takes us. It certainly does not authorize the insurer to accelerate unrecouped charges in the form of a "premium cessation charge" when a member discontinues contributions.

22. Clause 4 under the heading "Summary of Investment Provisions" (see paragraph 16) to which the respondents refer states that the "asset value" is the value of the investment account reduced by 'unrecouped expenses' as determined by the actuary. Again the respondents omit to state the relevance of clause 4. In any event it is also too vague to assist their case. How are those unrecouped expenses calculated or determined? Clause 4 certainly does not authorize the *acceleration* of unrecouped expenses when a member ceases contributions early.

23. There is accordingly no authority in the rules or the policy document to deduct a "premium cessation charge" when a member ceases contributions.

24. As Davis J stated in the *De Beer* judgment (at 660D-E), the fund cannot simply be treated as an illusionary go-between between the members and the insurer. It should be accountable to its members and hence be subject to the discipline of the Act's complaint mechanism. On the issue of the charges levied by the insurer, Davis J stated as follows (at 663E-G):

> "It follows that the reasonableness of the total charges levied by the insurers from time to time in respect of the administration of the fund and the apportionment thereof among beneficiaries are considerations of which account must be taken by Applicant's management committee. Similarly, the reasonableness of investments effected and maintained by the insurer for the fund from time to time should be examined by the management committee, if the latter is to fulfill its fiduciary responsibilities to members. In addition, the adequacy of disclosure of information which is critical to the interests of members, such as an adequate and fair explanation as to the meaning of documents which provide illustrative values at the inception of the contract as well as the adequacy of disclosure by the insurer to members from time to time, must, in the light of the analysis advanced, comprise part of the responsibilities of the management committee of applicant."

25. For the above reasons, I am satisfied that the fund was not entitled to permit the deduction of R13 351.06 from your investment value since it was not authorized by the rules or by the terms of the policy between the fund and the insurer. You are therefore entitled to be placed in the position you would have been in had the deduction on your investment value not been effected.

<u>Relief</u>

26. In the result I make the following order:

26.1 It is hereby declared that the respondents were not entitled to deduct any amount from the complainant's fund value by reason only of her stopping contributions to the fund before her chosen retirement date.

26.2 The fund and insurer (in its capacity as administrator and/or investor of the fund's assets) are jointly and severally ordered forthwith to credit your account in the fund with R13 351.06 plus interest thereon at the rate of 15.5% per annum, from the date of this determination to the date of such crediting.

Dated at Cape Town on this day of 2006.

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator