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Please quote our reference: **PFA/WC/00039459/2017/TD**

REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): R JANUARY OBO INSPIRED SCHOOLS (PTY) LTD (“complainants”) v CORPORATE SELECTION RETIREMENT FUND NO 2: PARTICIPATING EMPLOYERS – REDDAM HOUSE WATERFALL, REDDAM SCHOOL ATLANTIC SEA BOARD, REDDAM SCHOOLS, REDDFORD HOUSE BLUE HILLS (PTY) LTD AND REDDFORD HOUSE THE HILLS (PTY) LTD (“first respondent”), CORPORATE SELECTION UMBRELLA PENSION FUND: PARTICIPATING EMPLOYERS – REDDAM HOUSE SOMERSET LAKES (PTY) LTD, REDDFORD HOUSE NORTHCLIFF (PTY) LTD (“second respondent”) AND LIBERTY GROUP LIMITED (“third respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the delay in the transfer of funds from the first and second respondents to Sygnia Umbrella Retirement Fund in terms of section 14 of the Act which is ascribed to the complainants’ failure to provide the first and second respondents with contribution schedules to reconcile overpaid contributions.

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- 1.2 The complaint was received by this Tribunal on 20 November 2017. A letter acknowledging receipt thereof was sent to the complainants on 12 December 2017. On the same date, letters were dispatched to the respondents giving them until 23 January 2018 to file their responses to the complaint. On 19 January 2018 and 22 May 2018, responses were received from the third respondent. On 24 January 2018, a copy of the third respondent's response was forwarded to the complainants requesting them to file further submissions by 6 February 2018. On 7 February 2018, the complainants requested an extension to file further submissions by 7 March 2018. Further submissions were received from the complainants on 11 May 2018. A further response was received from the second respondent on 21 June 2018. Submissions were received from the Financial Sector Conduct Authority ("FSCA") on 27 June 2018.
- 1.3 Having considered the submissions before this Tribunal, it is considered unnecessary to hold a hearing in this complaint. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complainants were participating employers in the first and second respondents with effect from 1 November 2012, 1 February 2015 and 1 February 2016 until 28 February 2017. The third respondent is the first and second respondents' administrator. The complainants are now participating in Sygnia Umbrella Retirement Fund. The complainants' funds in the first respondent are still to be transferred to Sygnia Umbrella Retirement Fund in terms of section 14 of the Act.
- 2.2 The delay in the transfer of the complainants' funds from the first respondent to Sygnia Umbrella Retirement Fund in terms of section 14 of the Act is the subject matter of this complaint.

[3] **COMPLAINT**

- 3.1 The complainants stated that since the inception of its participation in the first and second respondents on 1 November 2012, 1 February 2015 and 1 February 2016 respectively, the funds have been administered by the third respondent. They submitted that with effect from 28 February 2017, they terminated their participation in the first and second respondents to participate in Sygnia Umbrella Retirement Fund. They stated that on 1 March 2017, the process for the transfer of the assets and member records from the first and second respondents to Sygnia Umbrella Retirement Fund in terms of section 14 of the Act commenced. They submitted that on 1 November 2017, the third respondent informed it that the section 14 transfer applications had still not been lodged with the Financial Sector Conduct Authority (“FSCA”); extensions have been obtained from FSCA for the section 14 transfer to be lodged until 31 December 2017 and 30 January 2018, respectively; overpayments which have been made have not been allocated to the members concerned; and the section 14 transfer process could not be completed until the overpaid amounts have been allocated to the members.
- 3.2 The complainants submitted that the third respondent proposed to refund the overpaid amounts to the employers entitled to such refunds, distribute the overpaid amounts to current active members as an additional voluntary contribution in terms of the rules of the fund or distribute the overpaid amounts to the current members identified as per reconciliation and to the withdrawn members identified over the period concerned. The complainants stated that the third respondent is aware that it will not be in a position to ensure that the member benefits comprising the overpaid amounts are proportionately distributed to current and withdrawn members without a reconciliation detailing the

overpayments relating to each member. They submitted that the delay in finalising the section 14 transfer is prejudicial to the members.

- 3.3 The complainants are requesting this Tribunal to determine the process that must be followed by the first and second respondents in allocating and distributing the overpaid amounts, who will be liable for any additional administration costs that may be incurred as a result of the allocation of the overpaid amounts and who will be liable for any penalties that may be levied by FSCA if the section 14 transfer is not finalised before the extension deadline provided by FSCA.

[4] RESPONSE

- 4.1 The third respondent filed a response in its capacity as the first and second respondents' administrator.
- 4.2 It stated that the following entities ceased participating in the first and second respondents with effect from 1 March 2017:

Fund number	Fund name	Overpaid amount	Date of inception
0030273090	Reddam Schools	604 973.03	1 November 2012
0030274150	Reddam House Waterfall (Pty)	383 178.13	1 November 2012
0030274143	Reddam School Atlantic Sea Board (Pty) Ltd	236 559.30	1 November 2012
0030313402	Reddam House Somerset Lakes (Pty) Ltd	66 561.31	1 February 2015
0030300668	Reddford House Blue Hills (Pty) Ltd	28 833.67	1 February 2015
0030300643	Reddford House The Hills (Pty) Ltd	3 703.76	1 February 2016
0030313385	Reddford House Northcliff (Pty) Ltd	226.57	1 February 2016

- 4.3 The third respondent submitted that a meeting was held in an attempt to resolve the overpaid refund which was holding up the section 14 transfer. It stated that this could not be resolved even after it provided the requested reconciliations to the financial advisor prior to the meeting. It submitted that monthly statements were sent to the financial advisor and the complainants which clearly reflected the overpayments. It stated that even though the fund was in credit, the complainants continued to make additional contributions. It submitted that it requested confirmation of how the complainants wish to manage the credits in the first and second respondents and to date no feedback was provided. It stated that during December 2017, it requested a further extension from FSCA for the finalisation of the section 14 transfer and it is awaiting a response.
- 4.4 The third respondent submitted that for it to proceed with the section 14 transfer, it requires a decision to be taken by the complainants with regard to the overpaid contributions. It stated that while the assets are still with the first and second respondents, it will attract fund interest.
- 4.5 In its further response, the third respondent submitted that it has been liaising with the complainants to obtain the salary schedules to provide a revised reconciliation on all contributions to date. It stated that the complainants informed it that they do not have the salary schedules in order for them to adjust and re-allocate the overpaid amounts. It advised the complainants that if it uses the salary schedules on record, it will come to the same result which reflects that the complainants have overpaid contributions. It suggested that the overpaid contributions be refunded to the complainants in order to continue with the section 14 transfer application.
- 4.6 In its further response, the second respondent stated that it provided the following options to the third respondent:

- Refund the overpayment amount to the respective schools, thereby eliminating the agterskot issue;
- Distribute the overpayment to the current members identified as per the reconciliation and the withdrawn members. It requested the revised schedules which to date are still outstanding; and
- Distribute the overpayment amount to current active members on a pro-rata basis,

4.7 It stated that provide a target date for payment of agterskot as no response was received in terms of the options provided on the fund credit. It submitted that it is liaising with FSCA for guidance on the matter regarding fund credits. It stated that it is proceeding with the section 14 transfer.

Complainants' further submissions

4.8 The complainants stated that for more than a year, they have been making attempts to obtain guidance from the first and second respondents on the correct process that must be followed for the apportionment and distribution of the overpaid contributions and to complete the section 14 transfer process. They submitted that the third respondent failed to mention that it was unable to conclude the reconciliation despite being provided with the schedules. They stated that it is irresponsible and a derogation of statutory duties to ensure proper distribution of fund benefits to members for the first and second respondents to simply refund the overpaid contributions.

Submissions from FSCA

4.9 FSCA stated that the issue of credit balances in the third respondent should not have delayed the section 14 transfer application. It submitted that this issue could have been handled separately from the main section 14 transfer and if at the end it is decided that the additional money should be paid to the members, then agterskot

transfer could be done. It stated that this prejudice to members is unwarranted. It submitted that the first respondent must submit its section 14 transfer soon and the outstanding issue with the third respondent can be resolved separately.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issue for determination is whether or not the first and second respondents should be held liable for the delay in finalising the transfer of the complainants in terms of section 14 of the Act from the first respondent to Sygnia Umbrella Retirement Fund which is ascribed to the complainants' failure to provide the first and second respondents with contribution schedules in order to reconcile and allocate the overpaid contributions to members.

5.2 The rules of a fund are supreme and binding on its officials, members, shareholders, beneficiaries and anyone so claiming from the fund (See Section 13 of the Act and *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28]).

Payment of contributions

5.3 Rules 5.1 and 5.2 of the first respondent's master rules dealing with member's and employer's contributions provide as follows:

"5.1 MEMBER'S CONTRIBUTIONS

5.1.1 A MEMBER, other than a DEFERRED MEMBER or a DEFERRED PENSIONER, shall contribute at the rate as set out in the PARTICIPATION CERTIFICATE applicable to the EMPLOYER.

5.1.2 ...

5.2 EMPLOYER'S CONTRIBUTIONS

5.2.1 The EMPLOYER shall contribute in respect of each MEMBER at the rate as set out in the PARTICIPATION CERTIFICATE applicable to the EMPLOYER.

5.2.2 ...

5.2.3 In addition to the contributions referred to in Clause 5.2.1 and 5.2.2, an EMPLOYER may from time to time make additional contributions to the FUND in respect of a MEMBER, subject to any requirements that the COMMISSIONER may impose. These contributions will be allocated to the MEMBER'S SHARE OF THE FUND."

5.4 Rules 5.1 and 5.2 of the second respondent's master rules dealing with member's and employer's contributions provide as follows:

"5.1 MEMBER'S CONTRIBUTIONS

5.1.1 A MEMBER, other than a DEFERRED MEMBER or a DEFERRED PENSIONER, shall contribute at the rate as set out in the SCHEDULE applicable to the EMPLOYER.

5.1.2 ...

5.2 EMPLOYER'S CONTRIBUTIONS

5.2.1 The EMPLOYER shall contribute in respect of each MEMBER at the rate as set out in the SCHEDULE applicable to the EMPLOYER.

5.2.2 ...

5.2.3 In addition to the contributions referred to in Clause 5.2.1 and 5.2.2, an EMPLOYER may from time to time make additional contributions to the FUND in respect of a MEMBER, subject to any requirements that the COMMISSIONER may impose. These contributions will be allocated to the MEMBER'S SHARE OF THE FUND."

- 5.5 The complainants have a duty placed on them by the provisions of section 13A(1)(a) and (b) of the Act and the rules of the first respondent to pay contributions and submit schedules to the first respondent indicating on whose behalf payment is being made, and the first respondent in turn has a duty to pay out benefits to the members. Section 13A(3)(a)(i) states that such contributions must be paid directly into the fund's account and section 13A(3)(a)(ii) states that the contributions must be paid directly to the fund in such a manner as to have the fund receive the contributions not later than seven days after the end of that month for which such contributions are payable.
- 5.6 The third respondent submitted that monthly statements reflecting the overpayments were sent to the financial advisor and the complainants. It stated that even though the fund was in credit, the complainants continued to make additional contributions. It submitted that it requested confirmation of how the complainants wish to manage the credits in the first and second respondents and to date no feedback was provided. The rules of the first and second respondents do allow additional contributions to be paid and same should be allocated to member's share of the fund.
- 5.7 The facts indicate that the overpaid contributions have not been allocated by the first and second respondents due to outstanding schedules. The complainants on the other hand stated that schedules were provided to the first and second respondents who failed to finalise the reconciliation despite being provided with the schedules. This Tribunal would like to highlight that section 13A of the Act requires the

employer to pay contributions and submit schedules to the fund indicating on whose behalf payment is being made. The third respondent advised the complainants that if it uses the salary schedules on record, it will come to the same result which reflects that the complainants overpaid contributions. Regulation 33 of the Act requires the employer to provide the fund with the initial contribution statement containing the following:

- (i) Name of the fund; identification of the fund; period in respect of which the contribution is payable;
- (ii) Name and address of the employer or pay-point which made the deduction; responsible person to contact at the employer or pay-point;
- (iii) Full name, date of birth, membership date, pensionable emoluments of member and percentage of amount of contributions, split between member and employer as well as an indication of any additional voluntary contributions paid.

5.8 The Regulation further requires the employer to provide the fund with subsequent contribution statement consisting of reconciliation with the contribution statement for the previous period showing any differences in the data such as additions as a result of new members, reductions as a result of membership terminations, adjustments as a result of changes in pensionable emoluments or the payment of additional voluntary contributions. On 25 June 2018, this Tribunal requested the respondents to provide it with information it received and the date on which it was provided or received. The respondents failed to provide this Tribunal with clarity as requested. It is also important to note that the respondents have a duty to allocate contributions and reconcile same. Had the respondents reconciled contributions diligently on a month to month basis and informed the complainants, this issue could have been avoided. It appears from all the correspondence the second respondent provided that a proper reconciliation was done only when the complainants decided to transfer.

5.9 The duties of the second respondent as the first respondent's administrator in terms of section 13B(5) of the Act are as follows:

- (a) endeavour to avoid conflict between the interests of the administrator and the duties owed to the fund, and any conflict of interest or potential conflict of interest must be disclosed by the administrator to the board setting out full particulars of how such conflict will be managed;
- (b) administer the fund in a responsible manner;
- (c) keep proper records;
- (d) employ adequately trained staff and ensure that they are properly supervised;
- (e) have well-defined compliance procedure;
- (f) maintain the prescribed financial resources to meet its commitments and to manage the risks to which the fund is exposed;
- (g) furnish the registrar with such information as requested by the registrar where such request is reasonable, the purpose for the request is disclosed and reasonable notice is given to the administrator in order to meet the request;
- (h) within a reasonable time provide a fund with information pertaining to the fund that the administrator has in its possession or under its control as requested by the fund in an electronic format capable of manipulation by the fund or in any other format if the information pertaining to the fund is not available in electronic format.

5.10 In this instance, the second respondent failed to comply with its duties in terms of section 13B(5) of the Act.

5.11 FSCA stated that the issue of credit balances in the third respondent should not have delayed the section 14 transfer application. It submitted that this issue could have been handled separately from the main section 14 transfer and if at the end it is decided that the additional money should be paid to the members, then agterskot

transfer can be done. It stated that this prejudice to members is unwarranted. It submitted that the first respondent must submit its section 14 transfer soon and the outstanding issue with the third respondent can be resolved separately.

Transfer of the complainants' benefits

5.12 Section 14 of the Act, deals with the transfer of business from one fund to the other, and it provide as follows:

- “(1) Subject to subsection (8), no transaction involving the amalgamation of any business carried on by a registered fund with any business carried on by any other person (irrespective of whether that other person is or is not a registered fund), or the transfer of any business from a registered fund to any other person, or the transfer of any business from any other person to a registered fund shall be of any force or effect unless -
- (a) the scheme for the proposed transaction, including a copy of every actuarial or other statement taken into account for the purposes of the scheme, has been submitted to the registrar within 180 days of the effective date of the transaction;
 - (b) the registrar has been furnished with such additional particulars or such a special report by a valuator, as he may deem necessary for the purposes of this subsection;
 - (c) the registrar is satisfied that the scheme referred to in paragraph (a) is reasonable and equitable and accords full recognition -
 - (i) to the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund where such rights and reasonable benefit expectations relate to service prior to the date of transfer;
 - (ii) to any additional benefits in respect of service prior to the date of transfer, the payment of which has become established practice; and

- (iii) to the payment of minimum benefits referred to in section 14A,

and that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the requirements of this Act or to remain in a sound financial condition or, in the case of a fund which is not in a sound financial condition, to attain such a condition within a period of time deemed by the registrar to be satisfactory;

- (d) the registrar has been furnished with such evidence as he may require that the provisions of the said scheme and the provisions, in so far as they are applicable, of the rules of every registered fund which is a party to the transaction, have been carried out or that adequate arrangements have been made to carry out such provisions at such times as may be required by the said scheme;
- (e) the registrar has forwarded a certificate to the principal officer of every such fund to the effect that all the requirements of this subsection have been satisfied.”

5.13 This Tribunal would like to emphasise that a section 14 transfer is dependent on two funds, the transferor fund and the transferee fund, each completing its portion of the application form and submitting it to FSCA for approval. It should be noted that FSCA will not approve the section 14 transfer from the first and second respondents to Sygnia Umbrella Retirement Fund if the transfer is going to be prejudicial to the members.

5.14 From the submissions before this Tribunal, it appears that the delay in the transfer of funds from the first and second respondents to Sygnia Umbrella Retirement Fund was due to the fault on the part of the respondents. The issue of overpayment of contributions should have been handled separately from the main section 14 transfer application. The respondents were provided with schedules hence they were able to notice that there were overpayments. This Tribunal denounce the

respondents' conduct of only raising the issue of overpayments when a section 14 transfer was requested by the complainants. This Tribunal view the issue of overpayments raised by the respondents as a delaying tactic to finalise the section 14 transfer and the respondent must desist from doing that. The delay is prejudicial to members and is also unwarranted. This Tribunal cannot be clogged up with complaints where funds are acting unlawfully when faced with loss of business. The delay in finalising the section 14 transfer is not in the best interest of the respondents' members. The respondents failed to take all reasonable steps to ensure that the interest of members are protected as required in terms of section 7C(2)(a) of the Act.

5.15 In light of the above, this Tribunal finds that the first and second respondents are the cause for the delay in finalising the section 14 transfer of the complainants' funds to Sygnia Umbrella Retirement Fund and must be held liable for any penalties that may be levied (see *Palk v Perpetua Retirement Annuity Fund and Another* [2005] 8 BPLR 715 (PFA)). The first and second respondents must refund the complainants the overpayments based on the schedules received and process the section 14 transfer of the complainants to Sygnia Umbrella Retirement Fund without delay.

[6] **ORDER**

6.1 In the result, the order of this Tribunal is as follows:

6.1.1 The first and second respondents are ordered to refund the complainants' overpaid contributions within three weeks of this determination;

6.1.2 The first and second respondents are ordered to submit their section 14 transfer application forms for the transfer of the complainants' benefits and submit them to Sygnia Umbrella

Retirement Fund which must complete its part and forward same to FSCA for consideration, within six weeks of this determination;

- 6.1.3 The first and second respondents are ordered to update the complainants every two weeks on progress of the section 14 transfer of their fund value to Sygnia Umbrella Retirement Fund;
- 6.1.4 The first and second respondents are ordered to inform the complainants and this Tribunal of the outcome of the section 14 transfer application within one week of receiving same from FSCA; and
- 6.1.5 The first and second respondents are ordered to provide the complainants' employees who are their members with their latest benefit statements indicating their fund value and the growth thereof within eight weeks of this determination.

DATED AT PRETORIA ON THIS 28TH DAY OF JUNE 2018

MA LUKHAIMANE

PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

Complainants represented by Glyn Marais Inc

Respondents unrepresented

ANNEXURE A

Complainants' details

No.	Names
1	Reddam House Waterfall
2	Reddam School Atlantic Sea Board
3	Reddam Schools
4	Reddford House Blue Hills (Pty) Ltd
5	Reddford House The Hills (Pty) Ltd
6	Reddam House Somerset Lakes (Pty) Ltd
7	Reddford House Northcliff (Pty) Ltd