Ombudsman's Determination

Applicant: Mr L

Scheme: David Whitehead & Sons Limited Small Self-Administered Scheme (the **SSAS**)

Respondents: Rowanmoor Executive Pensions Limited and Rowanmoor Trustees Limited (**Rowanmoor**)

Complaint Summary

Mr L has complained that Rowanmoor has failed to correctly distribute the SSAS funds on the death of his fellow trustee/member, Mr Y. In particular, he has complained that action by Rowanmoor has compromised a determination made by an independent expert engaged under the SSAS' trust deed and rules.

Summary of the Ombudsman's Determination and reasons

The complaint is not upheld against Rowanmoor because there are no grounds on which to set aside the determination made by Robert Graham & Co.

Detailed Determination

Material facts

1. David Whitehead & Sons Limited (the **Company**) was a participating employer in the Lonrho Textiles Pension Plan (the **Lonrho Plan**) until 1996. Following a management buy-out, the Company was/is owned by Mr L and his wife. Mr L was/is the Company's managing director. Mr Y was also a director and the Company's secretary and accountant.

2. The SSAS was established in 1996. It is currently governed by a Trust Deed and Rules dated 6 April 2006 (the **Trust Deed and Rules**). Extracts from the Trust Deed and Rules are provided in Appendix 1.

3. There were two members of the SSAS; Mr L and Mr Y. They were both also trustees of the SSAS, together with a professional trustee company. The first professional trustee, appointed in 1996, was Cartwright Trustees Limited (**Cartwright**). It was replaced by Scottish Mutual Assurance plc in 2001, which was, itself, replaced by

James Hay Pension Trustees Limited in 2005. Rowanmoor was appointed in April 2006, having acquired James Hay Pension Trustees Limited's small self-administered scheme business.

4. Mr L and Mr Y were both also members of the Lonrho Plan. Mr L was a member of the directors' section and Mr Y was a member of the standard section. Following the establishment of the SSAS, transfer payments were made from the Lonrho Plan in respect of both Mr L and Mr Y. Mr L's transfer payment amounted to £63,311 (including a share of a surplus). Mr Y's transfer payment amounted to £146,689 (including a share of a surplus).

5. An initial actuarial valuation of the SSAS was undertaken in 1996 by Cartwright (the **1996 Valuation Report**). The report stated:

> "The members' entitlement to benefits are determined by the contributions made to the Scheme on their behalf and the investment income earned on these contributions, but are subject to the maximum benefits allowable under Inland Revenue regulations."

6. The 1996 Valuation Report recorded that there were two members: Mr L and Mr Y. Their remuneration was recorded as £32,136 and £27,052 respectively. It stated that the objective of the valuation was to calculate, on the basis of given assumptions, the maximum annual contributions which might be paid to the SSAS in the future without the members' benefits exceeding Inland Revenue limits. It then explained the actuarial methods used.

7. The 1996 Valuation Report stated that the present value of the SSAS' retirement benefits (liabilities) was £674,433. The actuary said that, based on the information supplied and the assumptions described in his report, the benefits payable from normal retirement date were unlikely to exceed Inland Revenue limits if annual contributions did not exceed:

	Basis 1	Basis 2
Mr L	£20,709	£17,185
Mr Y	£42,586	£23,755

Basis 1 assumed level annual contributions and made no allowance for the receipt of the transfer values. Basis 2 made allowance for the anticipated level of the transfer payments.

8. A further actuarial valuation of the SSAS was undertaken in 2000. The valuation report (the **2000 Valuation Report**) stated that, as at 13 September 1999, the value of the SSAS' assets was £310,389, including the transfer payments. This was made up of £233,379 insured assets and £77,010 cash on deposit. The actuary said she had been advised by the managing trustees that the insured assets had been notionally allocated to the member on whose life the policy was written. With regard to the non-insured assets, the actuary recorded these as shared 30% to Mr L and

70% to Mr Y. The 2000 Valuation Report stated that the maximum contributions permitted by the Inland Revenue expressed as a percentage of each year's remuneration were 42.6% for Mr L and 47.7% for Mr Y. Mr L's remuneration per annum was stated to be £35,940 and Mr Y's was £30,270. The maximum contributions were, therefore, £15,310.44 and £14,438.79 respectively.

9. According to a 2003 actuarial valuation report (the **2003 Valuation Report**), the SSAS' assets were valued at £434,642 as at 30 September 2002. However, this included a transfer payment in respect of protected rights for Mr L which the actuary noted should not have been accepted. He said he was taking steps to have the transfer payment moved to an appropriate arrangement. The 2003 Valuation Report recorded that the annual contribution for Mr L was 41.3% of his remuneration. The annual contribution for Mr Y was 58.3% of his remuneration. Mr L's remuneration for the year ending January 2003 was recorded as £38,871 and Mr Y's was £32,738. The actuary also recorded that Mr L had joined the Lonrho Plan in 1988 and Mr Y had joined in 1974[1]. The value of benefits remaining in the Lonrho Plan were £7,931 and £46,381 respectively and represented Mr L's and Mr Y's contracted-out rights (Guaranteed Minimum Pensions (**GMP**)).

10. The 2003 Valuation Report noted that the purpose of the valuation was to check that the intended contributions to the SSAS and the resulting benefits were within Inland Revenue limits. It recorded total employer contributions in each of the years ending September 2000, 2001, and 2002 at £20,000. The total member contributions in each of these years was £2,954. The 2003 Valuation Report concluded:

"The maximum contributions permitted by the Inland Revenue for the current triennium are set out below:

Annual contribution	[Mr L]	[Mr Y]
expressed as a percentage	41.3%	58.3%
of each year's remuneration		
in the first year of the triennium	£16,070	£19,080
based on current remuneration		

These contributions are the maximum contributions for the member to all schemes of the Employer.

I confirm that the current level of the members' contributions being paid towards the scheme is within Inland Revenue limits.

Contributions can be paid at a lower level but not at a higher level than those shown. In particular it should be noted that if remuneration fluctuates, the maximum payable is the fixed percentage of that variable remuneration."

[1] The actuary had assumed continuous service and continued rights for the purposes of the valuation.

11. Mr L has provided a copy of a note which he has explained was attached to the 2003 Valuation Report. In this, the actuary says:

> "The last report was prepared as at 13 September 1999 and there have been no major changes, however, it would appear the assets have been split incorrectly in the last report. Therefore, I have re-visited the split since we took over this scheme.
>
> Also, the IFA confirmed the [Company] was part of the Lonrho Textile Group that was sold out in 1996. For the purposes of the calculations I will assume that the members are entitled to continuous service and continued rights.
>
> Also, the GMP value was incorrectly calculated in the report …"

12. On 26 March 2004, Mr L and Mr Y instructed the then professional trustee to disinvest certain funds. The funds involved amounted to £84,009 in respect of Mr L and £203,197 in respect of Mr Y. Mr L and Mr Y asked the professional trustee to make the transfer cheques payable to Norwich Union. The letter was signed by both Mr L and Mr Y.

13. On 20 January 2006, Mr Y wrote to an employee of Rowanmoor[2] (**JC**) (the **2006 Letter**). Mr Y signed the 2006 Letter as trustee. It was a response to a request for information dated 17 January 2006. In the 2006 Letter, Mr Y referred to an attached schedule of salary history which had not been supplied. He confirmed that no bonuses had been paid. Mr Y said:

> "During the lifetime of the SSAS, we have assumed that the employer contributions to the scheme would be split pro rata to the employee contributions … thus giving the following split for the year to September 2004, and any previous years as:
>
> [Mr L] £10,959
>
> [Mr Y] £9,041
>
> The member contributions are genuine contributions to the SSAS by [Mr L] and myself, which are represented by deductions each month from our respective salaries and paid into the SSAS bank account …"

14. In 2006, Mr Y began to draw an annual pension of £15,625. In addition, he took a lump sum of £84,005. Payment of the lump sum and pension was confirmed by a Trustees' Memorandum signed by Mr Y, Mr L and Rowanmoor in May 2006 (the **Trustees' Resolution**).

15. On 19 May 2006, Rowanmoor wrote to Mr Y confirming safe receipt of the Trustees' Resolution and that it had been signed by Rowanmoor. The author of the letter (**CN**)

[2] Then James Hay Pension Trustees Ltd.

said she had telephoned Mr L that day to request a cheque be drawn for Mr Y's lump sum. She said Mr L would speak to Mr Y on Monday 22 May 2006.

16. In April 2017, Mr Y's share of the fund was valued by Rowanmoor at £192,697.

17. Mr Y died in March 2018. Mrs Y, was named on his expression of wish form as the recipient of any death benefits payable by the SSAS. She was also the sole beneficiary under Mr Y's will. Mrs Y submitted paperwork to claim a death benefit to Mr L in April 2018. He forwarded this on to Rowanmoor.

18. Mr L subsequently raised a query concerning his and Mr Y's respective shares of the SSAS' funds. Briefly, Mr L was of the view that he should have been allocated a larger share of the funds because he held a more senior position in the Company. He was also of the view that a transfer payment from the Lonrho Plan relating to a surplus in that scheme should not have been divided between him and Mr Y.

19. Mrs Y's claim to a death benefit was the subject of an application to the Pensions Ombudsman in 2019. Following an investigation by an adjudicator, Mrs Y's complaint was resolved on the basis that Mr L and Rowanmoor would appoint an expert, under Clause 8.4 of the Trust Deed (see Appendix 1), to decide the amount of death benefit payable to Mrs Y.

20. The first independent expert was appointed in December 2019 but resigned in February 2020. Robert Graham & Co, was appointed in February 2020. Robert Graham & Co is a SIPP and SSAS provider. It provides professional trustee, scheme administration and actuarial services.

21. Also in February 2020, Mr L and his wife signed a directors' resolution (the **Board Resolution**) allocating 100% of the employer contributions paid since the establishment of the SSAS to him. Mr L states that the minute was drafted by a solicitor who had been asked, by the first independent expert, to give an opinion on the status of the 2006 Letter. Mr L states that the solicitor's opinion was that the 2006 Letter was not binding and the allocation of the employer's contributions was a matter for the Company to determine. Mr L states that, in the absence of any instructions from the Company, the solicitor was asked to draft a minute for the board of the Company to execute.

22. Robert Graham & Co issued its report on 22 September 2020. A summary of the report is provided in Appendix 2. It concluded:

> "… subject to the legal point of whether an agreement made in a conversation between the directors counts as a company decision, we believe that the more credible split is the 54.80% to [Mr L] / 45.20% to [Mr Y] split."

23. In April 2021, in correspondence with Mr L's solicitors, solicitors acting for Rowanmoor said the amount payable to Mrs Y had been estimated to be £172,282, but an exact amount required a current portfolio valuation.

Mr L's position

24. Mr L has made extensive submissions. What follows is, of necessity, a summary of the main points:-

- He was informed, by email in March 2018, that Mr Y's son worked for Rowanmoor. He had not previously been made aware of this, either by Mr Y or Rowanmoor. Rowanmoor should have advised him of this conflict of interest. It cannot be perceived to be impartial.
- The figures quoted by Rowanmoor are incorrect and favour Mrs Y.
- Mrs Y believes she is entitled to £192,697; whereas he has calculated that the amount due is nil.
- Letters from Mrs Y contain specific information which he believes to have been supplied to her by someone working in the pensions field and this is likely to have been her son. For example, there is reference to Section 50, Pensions Act 1995.
- Rowanmoor did not contact Cartwright[3].
- Rowanmoor did not contact David Roberts & Partners[4].
- Rowanmoor failed to contact an independent financial adviser who had previously worked for David Roberts & Partners (**Mr N**)[5]. Rowanmoor's employee informed him and later informed Robert Graham & Co that Mr N had died when this was not the case. However, he was not surprised that, when contacted, Mr N did not have any information about the split of the Company's contributions because there was no information.
- Rowanmoor failed to interview JC, despite the fact that he works for it.
- Rowanmoor should have shared its letter to Robert Graham & Co with him.

[3] Mr L contacted Cartwright himself. In an email dated 23 October 2020, Cartwright said: "We have again retrieved our files from archives, and I hope that the following information is helpful: 1. [Cartwright] ceased to be Pensioneer Trustee on 19 June 1998 when it was replaced as Pensioneer Trustee by Scottish Mutual Assurance Plc. 2. We have checked our files, we have no record of any advised allocation of contributions between the scheme members. We would only have needed this for a triennial actuarial valuation, and none were undertaken while we were the Pensioneer Trustee. 3. As the Scheme commenced in 1996, triennial actuarial valuations would have been due in 1999 and 2002. Whoever undertook these actuarial valuations would need to have been advised of the split of the contributions paid between the scheme members. You may therefore wish to contact the Actuary responsible for these valuations to see if they have retained this information on their files."

[4] Mr L contacted this company and, in an email dated 22 November 2020, it said: "despite a thorough search of our archives, we have no records relating to the allocation of contributions under the [SSAS] for the periods September 1998 – 2003."

[5] Mr L contacted Mr N and, in an email dated 23 November 2020, Mr N said: "Following our conversation, I am writing to confirm that we do not hold any information in relation to the [SSAS]."

- Allocation of the employer's contributions is a matter solely for the Company. The Company has never given any instructions as to the allocation of employer's contributions; nor was it ever asked to do so.

- Mr Y was an employee; whereas he was the owner of the Company. As the owner of the Company, he was paid a salary and also dividends. Following the management buy-out, eight employees continued to be employed by the Company. All were offered the opportunity to join the SSAS, but only Mr Y and he took this up. Mr Y was treated the same as the other six employees and there was no intention to enhance Mr Y's salary with employer contributions to the SSAS. The payment of pension contributions by the Company was intended solely as a tax efficient way for the owner to extract funds from the business. Through his actions, Mr Y effectively gave himself an unauthorised salary increase of around 30% per annum.

- Contrary to Robert Graham & Co's report, he and Mr Y did not fulfil broadly similar roles with broadly similar remuneration. Mr Y's total remuneration for the period 1996 to 2003 was £248,000; whereas his total remuneration for that period, as owner of the Company, was £640,000 when pension contributions (£150,000) and dividend income is included (see Appendix 3 for a breakdown of salary and dividend figures).

- Information about their respective salaries and his dividend receipts was provided to Robert Graham & Co, but this was ignored despite Robert Graham & Co acknowledging that dividends formed part of his remuneration.

- Robert Graham & Co also ignored legal advice provided for the first independent expert as to the effectiveness of the 2006 Letter. Nor did Robert Graham & Co seek legal advice of its own, despite not being lawyers.

- Robert Graham & Co was not provided with the 1996 actuarial valuation. The 1996 Valuation Report is the singular most important report and confirms that the payments which were made were within Inland Revenue limits.

- Robert Graham & Co referred to a directors' conversation in its report. There was no such conversation.

- Rowanmoor failed to include a letter from Mr Y in its bundle for Robert Graham & Co. Rowanmoor failed to provide copies of correspondence between Mr Y and JC.

- The lack of evidence from those in post at the time the employer's contributions were paid proves that Rowanmoor relied solely on Mr Y's letter of 20 January 2006 when determining the split of the employer's contributions and the resulting pension benefits.

- The 2002 Valuation Report states that the 1999 Valuation Report was incorrect.

- Rowanmoor supplied him with four telephone notes of conversations between JC and Mr Y, six letters from JC to Mr Y and three letters from Mr Y to JC. He has consulted his diaries and states that he was out of the office for all of the telephone conversations and was not a party to any of the correspondence. Nor did he have copies of the letters on his files.

- He did not have a copy of the 2006 Letter until one was provided by Rowanmoor on 3 August 2018.

- The 2006 Letter was signed by Mr Y, as trustee, and not by him, as director and owner of the Company. He raised concerns about this letter with Rowanmoor. It informed him that the letter had been provided by Mr Y's family. The only explanation he can think of is that Mr Y failed to file a copy of the letter in the office, but took a copy home with him.[6] Legal opinion was obtained to the effect that the letter was not legally binding.

- He believes that Mr Y's son has obtained confidential information concerning the SSAS and passed this to his family.

- With regard to Rowanmoor's retirement benefit form for Mr Y, he makes the following points:-

  - The name of the Rowanmoor employee who calculated Mr Y's benefits does not appear on the form and the dates quoted are after he left Rowanmoor.

  - The signature boxes are unsigned and undated.

  - There is no evidence of who prepared the calculations or who checked and authorised them.

  - There is a note stating, "Processed in my absence". He suggests that this means that the calculations were not checked or authorised before being paid.

  - The "Final check and countersign" box is empty and undated. He suggests that this means there was no final check.

  - There is a note stating, "Ask client for Pension Fund cheque in respect of TFLS for signature by Independent Trustee" and another stating "Spoke to [Mr L] to arrange cheque for [Mr Y] TFC he confirmed he will speak to [Mr Y] on Monday 22/5/2006". The handwriting is the same as that of an individual identified as CN in other parts of the form. He has never heard of or spoken to this individual and it would have been impossible for him to have done so on 19 May 2006[7] because he was at a corporate golf event in Scotland.

[6] Mr L has said that the letter of 20 January 2006 is date stamped received 23 January 2006. This is not visible on our copies.

[7] CN wrote to Mr Q, on 19 May 2006, saying she had telephoned Mr Y that day to confirm that the Company held the pension fund cheque book and to request that a cheque be drawn for his TFCS. CN said Mr Y would speak to Mr Q on 22 May 2006 with regard to this.

- Rowanmoor has taken a cavalier approach. He had not had a single meeting with its representatives between 2005 and 2018.

Rowanmoor's position

25. Rowanmoor submits:-

- It was aware that a member of its staff was connected with a member-trustee of the SSAS. Mr Y's son was employed after Mr Y had taken retirement benefits from the SSAS. It has procedures in place to manage such a situation and these were adhered to. Mr Y's son did not deal with any administration in relation to the SSAS. Its actuarial team reviewed all calculations relating to the SSAS and has been happy with them. Mr Y's son was not involved in these calculations.

- It acknowledges that no letter was issued to the member-trustees of the SSAS informing them that Mr Y's son had been employed by it. Mr Y would have been aware of his son's employment and it considers it reasonable to believe that he would have disclosed this information to Mr L. It did disclose its employment of Mr Y's son to Mr L, in an email dated 27 March 2018, after it had been notified of Mr Y's death. Its current policy is to disclose potential conflicts of interest to its customers.

- Rule 32 of the SSAS Rules:

  "Except as provided for expressly in the Definitive Deed the Trustees shall have full power to determine conclusively any questions or matters of doubt concerning the Scheme or the construction of the Definitive Deed … Such determination shall be binding on all interested parties."

  Only the SSAS trustees can decide on matters of doubt concerning the SSAS.

- Rule 8.4. The provision that the expert's determination shall be binding on the trustees is without qualification. The Courts have upheld the validity of provisions which stipulate that an expert's decision will be binding. This applies even if, which is not agreed, an expert's decision could be wrong[8].

- Mr L has raised a number of concerns following the publication of Robert Graham & Co's report. None of these would give rise to a finding that the report's conclusions were wrong or that there was a manifest error in the report. Regardless of this, the report's conclusions are binding on the SSAS trustees.

- The 1996 Valuation Report did not provide details of contributions paid to the SSAS. There is nothing in the 1996 Valuation Report which would have caused Robert Graham & Co to alter its views as to allocations. The 1996 Valuation

[8] In correspondence with Mr Y's solicitors, Rowanmoor's solicitors cited: Owen Pell Ltd v Bindi (London) Ltd [2008] EWHC 1420 (TCC); British Shipbuilders v VSEL Consortium plc [1997] 1 Lloyd's Rep 106; National Grid Co plc v M25 Group Ltd [1999] 1 EGLR 65 CA; Campbell v Edwards [1976] 1 WLR 403 CA; Alfred C Toepfer v Continental Grain Co [1974] 1 Lloyd's Rep 11 CA; Jones v Sherwood Computer Services plc [1992] 1 WLR 277 CA; Nikko Hotels (UK) Ltd v MEPC Plc [1991] 2 EGLR 103

Report clearly stated that the maximum contribution limits would be reduced by receipt of transfers from the Lonrho Plan.

- The calculation error in the 1999 Valuation Report would have altered the contribution recommendations, but not to the extent which would have allowed Mr L to make £20,000 contributions.

Conclusions

26. Under the terms of the Adjudicator's Opinion, which was accepted by the parties, the matter of Mr L's and Mr Y's share of the SSAS Fund was referred to an independent expert in accordance with Clause 8.4 of the SSAS' Trust Deed.

27. Robert Graham & Co issued its determination in September 2020. It concluded that:

> "… subject to the legal point of whether an agreement made in a conversation between the directors counts as a company decision, we believe that the more credible split is the 54.80% to [Mr L] / 45.20% to [Mr Y] split."

28. The legal point referred to by Robert Graham & Co relates to the Company's role in deciding on the members' share of the Fund. In particular, it relates to the status of the 2020 Board Resolution signed by Mr and Mrs L as directors of the Company. The Board Resolution purported to retrospectively allocate 100% of the employer contributions paid since the establishment of the SSAS to Mr L.

29. I shall, therefore, deal with the Board Resolution first. In order to do so, I need to refer to the Trust Deed and Rules.

30. Rule 5.1 provides:

> "5.1 The Employers shall make **such contributions to the Scheme as the Principal Employer may from time to time agree with the Trustees**. ..." (Emphasis added)

31. Rule 5.2 provides:

> "5.2 An Employer may at any time pay additional contributions to the Trustees provided that this **does not prejudice Registration** and the Trustees are satisfied that this will not result in the Scheme being treated as having made an Unauthorised Payment …" (Emphasis added)

32. The Company may, at any time, pay additional contributions to the SSAS; either for the general purposes of the SSAS or for a specific purpose. This would allow the Company to make contributions to the SSAS in respect of a particular member. However, the Trustees must be satisfied that any such contribution will not result in the SSAS being treated as having made an Unauthorised Payment.

33. Employer contributions form part of the Fund. The Fund is defined as:

> "… the monies, assets, property and investments held for by or on behalf of the Trustees on the trusts of and for the purposes of the Scheme and which from time to time constitute the fund of the Scheme. It includes (but is not limited to) contributions from Employers and Members …"

34. Rule 16.1 provides that the Fund shall be vested in the Trustees and held by them in accordance with the terms of the Trust Deed and Rules.

35. Rule 8.3 provides for the Trustees to apply a member's Accumulated Credit to providing a pension or annuity. The member's Accumulated Credit is defined as: "… that part of the Fund which is determined by the Trustees … as relating to the relevant Person at that time …". It includes: contributions paid by the Company and the member; any transfer amounts paid into the SSAS on behalf of the member; and the income and capital position of the Fund. In exercising their powers to determine the member's Accumulated Credit, the Trustees must be satisfied that their determination will not result in an Unauthorised Payment.

36. Therefore, the Trust Deed and Rules do, implicitly, permit the Company to make contributions in respect of a particular member. However, any contributions must be agreed with the Trustees, who must be satisfied that the contributions will not prejudice the SSAS' registration.

37. There is no evidence of any agreement between the Company and the Trustees to allocate 100% of the Company's contributions to Mr L. In fact, the evidence tends to suggest that such an agreement was highly unlikely to have been made. This is for two reasons: a Company contribution of £20,000 in any of the years in question in respect of Mr L would have exceeded Inland Revenue limits as advised by the SSAS' actuaries at the relevant times; and Mr Y (as a trustee) is unlikely to have agreed to nil Company contributions being allocated for his benefit. The first of these reasons is sufficient, on its own, to suggest that no such agreement was, or could have been, made between the Company and the Trustees.

38. Mr L has suggested that the dividends he received as a shareowner of the Company should have been included in his remuneration. Mr L is a member of the SSAS by reason of his capacity as an employee of the Company; that is, as a consequence of his role as a director, not as owner of the Company. The dividends Mr L receives as owner of the Company are not paid to him as part of his remuneration as a director. Rule 5.1 provides that the Employer (the Company) shall contribute: "only such sums as relate exclusively to the benefits to be provided **in respect of employment with that Employer**" (my emphasis). The Company can only make contributions to the SSAS in order to provide benefits which relate to employment by the Company; not ownership of the Company.

39. The actuaries calculated the maximum contributions on the basis of remuneration information provided to them at the relevant times. This was clearly set out in the valuation reports they provided and not queried by Mr L at the time.

40. This leads me to the matter of the 2020 Board Resolution. There is nothing in the Trust Deed and Rules which confers a power upon the Company to retrospectively allocate the employer contributions to a particular member's Accumulated Credit. The Board Resolution was signed by Mr and Mrs L in their capacity as directors of the Company. I find that the Board Resolution is ineffective.

41. Clause 8.4 states that the determination by the expert appointed by the Trustees shall be binding upon the Trustees. Mr L has argued that Robert Graham & Co's determination is incorrect and he has submitted a number of reasons for his view. It has been argued on Rowanmoor's behalf that, even if an expert's determination is incorrect, it is still binding. Briefly, the position is that, if the expert has not answered the question put to them, their decision can be considered a nullity[9]. However, if the expert has answered the right question, their decision is binding even if it is wrong[10].

42. I have some hesitation in accepting the position argued for by Rowanmoor's solicitors in the context of a pension scheme governed by trust deed. The cases they cited relate to the position between parties to a contract. I doubt that it can be correct for the trustees of a pension scheme to proceed on the basis of a determination by an expert if they know that determination to be incorrect. If the Trustees have any concerns about the expert's determination, I would expect them to seek clarification before proceeding; regardless of Clause 8.4.

43. On that basis, I think it appropriate to address the concerns raised by Mr L. These are summarised as follows:-

- Mr Y's son works for Rowanmoor; and
- Robert Graham & Co was not supplied with all relevant information.

44. On the first point, Rowanmoor has explained that Mr Y's son did not start working for it until after his father had taken his retirement benefits. It has confirmed that it has a policy in place to manage conflicts of interest and Mr Y's son does not work on the SSAS account. I find that Mr L has offered no credible evidence that Mr Y's son's employment with Rowanmoor had any impact on Robert Graham & Co's report or its determination process. He has argued that correspondence from Mrs Y indicates that she received information which he believes to have been supplied to her by someone working in the pensions field. Mr L has referred to Section 50, Pensions Act 1995. A simple search on the internet yields information about Section 50; not least from the website of The Pensions Regulator.

45. On the second point, Mr L has referred specifically to the following:

(i) the 1996 Valuation Report;

(ii) the 2006 Letter; and

[9] *Nikko Hotels (UK) Ltd*
[10] *Bindi*

(iii) correspondence between Mr Y and JC.

46. The 1996 Valuation Report was produced shortly after the SSAS had been established. It does not record any agreement as to the allocation of Company contributions. It does, however, record that the maximum permitted contribution in respect of Mr L should be £17,185 in any year. The 1996 Valuation Report covers the period up to September 1999; that is, the first three Company contributions. I do not find that Robert Graham & Co's determination is undermined by it not having sight of the 1996 Valuation Report. If anything, the 1996 Valuation Report supports Robert Graham & Co's conclusions.

47. The 2006 Letter was a response, written by Mr Y, to a request for information. It is part of a series of letters between Mr Y and JC relating to Mr Y's upcoming retirement. In the 2006 Letter, Mr Y explained: "we have assumed that the employer contributions to the scheme would be split pro rata to the employee contributions". He then gives the split for the year to September 2004, and any previous years, as: £10,959 to Mr L; and £9,041 to himself (54.8/45.2% respectively).

48. In the absence of any evidence to the contrary, I see no reason why Rowanmoor should not have acted on this letter. Mr Y was a director of the Company and a member trustee of the SSAS. He was not suggesting anything particularly outlandish in the contribution allocation; simply that it should reflect the respective member's contributions, which in turn reflected their respective salaries. I note Robert Graham & Co commented that it might have expected a higher percentage for Mr L to reflect his ownership of the Company. It suggested 75/25%. However, there is no absolute requirement for such a split and Mr L was still credited with the greater part of the Company's contribution.

49. Mr L has referred to a series of letters between Mr Y and JC. The letters begin in December 2005 with a request for information so that Rowanmoor can undertake some retirement calculations for Mr Y. The subsequent letters comprise Mr Y's responses and JC's requests for further information. It is clear that it is Rowanmoor's actuarial department which is undertaking the necessary calculations because JC refers to a query raised by that department in one of his letters. I find nothing sinister in the fact that the correspondence was marked "Strictly Personal" since it related to Mr Y's retirement.

50. Mr L has raised a number of other issues which he believes cast doubt on Robert Graham & Co's determination. He points out that Rowanmoor failed to contact previous trustees and/or administrators of the SSAS. However, when Mr L contacted these parties, he was told that they had no information about the SSAS. He now says that he was not surprised that no information was available. This raises the question as to why Mr L felt it necessary to place such emphasis on the fact that these parties had not been contacted by Rowanmoor.

51. Mr L has pointed out that a note from the actuary attached to the 2003 Valuation Report stated that the assets had been split incorrectly and a GMP value was

incorrectly calculated in the 2000 Valuation Report. Neither of these issues sheds any light on the split of Company contributions. I note, however, that the 2003 Valuation Report, like the 2000 Valuation Report before it, confirmed that the maximum permitted contribution for Mr L in any year would not have allowed for a £20,000 contribution from the Company for his benefit.

52. Mr L has raised issues relating to Rowanmoor's retirement benefit form for Mr Y. These have no bearing on the validity of Robert Graham & Co's determination relating to the allocation of the Company's contributions to the SSAS.

53. I find that there are no grounds to set aside Robert Graham & Co's determination and the Trustees of the SSAS, being Mr L and Rowanmoor, are bound by its findings. They should now take the necessary steps to implement those findings.

54. I do not uphold the complaint.

Anthony Arter
Pensions Ombudsman

20 January 2022

Appendix 1

Trust Deed and Rule of the SSAS

55. Clause 8.4 of the deed provides:

> "Decisions at Trustee meetings (or sub-committee meetings) must be unanimous. If the Trustees cannot reach a unanimous decision on any matter (excluding decisions relating to the termination or winding up of the Scheme) the matter shall be referred to an expert unanimously appointed by the Trustees whose determination shall be binding on the Trustees …"

56. Clause 16.1 of the deed provides:

> "16.1 The Fund shall be vested in the Trustees as joint tenants and held by them upon irrevocable trusts in accordance with the terms of the Definitive Deed.
>
> 16.2 All monies, assets, investments and property received by the Trustees for the purposes of the Scheme shall form part of the Fund …"

57. "Fund" is defined as:

> "… the monies, assets, property and investments held for by or on behalf of the Trustees on the trusts of and for the purposes of the Scheme and which from time to time constitute the fund of the Scheme. It includes (but is not limited to) contributions from Employers and Members, assets accepted or acquired by the Trustees for the Scheme and any resulting investment gains, returns or interest. This expression includes where appropriate any part of the Fund."

58. Clause 32 of the deed provides:

> "32.1 Except as provided for expressly in the Definitive Deed the Trustees shall have full power to determine conclusively any questions or matters of doubt concerning the Scheme or the construction of the Definitive Deed …
>
> 32.2 Such determination shall be binding on all interested parties."

59. Rule 5 "Employer's Contributions" provides:

> "5.1 The Employers shall make such contributions to the Scheme as the Principal Employer may from time to time agree with the Trustees. The Employers shall contribute only such sums as relate exclusively to the benefits to be provided in respect of employment with that Employer.
>
> 5.2 An Employer may at any time pay additional contributions to the Trustees provided that this does not prejudice Registration and the Trustees are satisfied that this will not result in the Scheme being

treated as having made an Unauthorised Payment. Such contributions may be made either for the general purposes of the Scheme or for one or more of the specific purposes referred to in this Definitive Deed …"

60. Rule 8.3 provides:

"At any time from a Member attaining Normal Minimum Pension Age … the Trustees may apply all or such part as they may determine of a Member's Accumulated Credit towards the provision of a Scheme Pension or the purchase of a Lifetime Annuity."

61. "Accumulated Credit" is defined as:

"… in relation to any Member … that part of the Fund which is determined by the Trustees subject to the following provisions of this definition as relating to the relevant Person at that time, having regard to:

(a) the contributions paid into the Scheme on behalf of the Person by the Employers and … by the Person;

(b) any transfer amounts paid into the Scheme on behalf of the Person;

(c) the income and capital position of the Fund (after allowing for expenses and other deductions); and

(d) any other matters which the Trustees consider appropriate.

Nothing in this definition shall confer on any person any right to any specific assets of the Fund which may be allotted to him on a notional basis for the sole purpose of determining the value of his Accumulated Credit from time to time. The Trustees may … have regard to the advice of an Actuary …

The Trustees shall in exercising their powers to determine the Accumulated Credit in respect of a Person exercise them in such manner that they are satisfied that their determination will not result in an Unauthorised Payment, or in an Unauthorised Payment being treated as having been made …"

62. Rule 12.12 provides:

"In respect of benefits expressed to be payable in accordance with this Rule ("Death Benefit"):

(a) any Death Benefit shall be held separately from the rest of the Fund on discretionary trusts to be distributed on such terms and in such shares as the Trustees decide to or for the benefit of any of the deceased's Death Benefit Beneficiaries …

(b) all Death Benefits shall be distributed within two years of the date of death of the deceased. If all or part of a Death Benefit remains unpaid at the end of

two years from the date of death it shall be retained for the general purposes of the Scheme …”

Appendix 2

Robert Graham & Co Report

63. The main points in the report are summarised below:-

- The SSAS has been funded since establishment by: transfer payments; regular monthly employee contributions via the Company payroll; and a number of ad hoc employer contributions.
- The payments to the SSAS comprised:

  Transfers

  a. £206,529 from the Lonrho Plan in October 1997

  b. £496.82 from Norwich Union in December 1997

  Employee contributions

  a. £246.15 per month from September 1996 to March 2006

  b. £134.88 per month from April 2006 to January 2008

  Employer contributions

September 1996	£10,000
September 1997	£20,000
September 1998	£20,000
September 1999	£20,000
September 2000	£20,000
September 2001	£20,000
September 2002	£20,000
September 2003	£20,000
Total	£150,000

- The benefits paid to Mr Y comprised

Lump sum	£84,005	paid June 2006
Income	£3,580.72	paid June 2006
	£1,302.08	paid monthly from July 2008 to March 2018

- Allocation of transfer receipts

  a. Lonrho Plan £34,761 (28.62%) to Mr L

£86,678 (71.38%) to Mr Y

b. Norwich Union £496.82 (100%) to Mr L

- Allocation of employee contributions

  September 1996 to March 2006

  £134.88 (54.8%) to Mr L

  £111.27 (45.2%) to Mr Y

  April 2006 to January 2008

  £134.88 (100%) to Mr L

- With regard to £85,090 relating to a surplus in the Lonrho Plan, Mr L was of the view that this should be allocated solely to him because he had been a member of the directors' section, which had granted enhanced benefits compared to other sections of the Plan. Mr L had also argued that he had "fought with" the Lonrho Plan to get a share of the surplus and so should be entitled to it. In conversation, Mr L had appeared to accept that it was industry standard to allocate a surplus in proportion to the individual transfer values.

- All employer contributions had been allocated on the basis of 54.8% to Mr L and 45.2% to Mr Y. Mr L was of the view that the employer allocations should have been allocated entirely to him.

- Cartwright had confirmed that the transfer surplus received had been allocated to the members of the SSAS in proportion to their share of the pension liabilities in respect of the Lonrho Plan (28.62% to Mr L and 71.38% to Mr Y).

- The enhanced benefits granted by the directors' section should have been reflected in Mr L's individual transfer value; that is, it would have been relatively higher than Mr Y's transfer value for the same employment history. It had not been able to verify this.

- It had not seen any evidence that the surplus related disproportionately to any particular part of the Lonrho Plan.

- It acknowledged Mr L's role in securing a share of the surplus, but was not aware that this created 'ownership' of the surplus.

- Rowanmoor had provided the following documents in support of its allocation of the employer contributions:-

  - A letter of 17 January 2006 to Mr Y (at the Company's address) requesting a split for the £20,000 contribution paid in the year ending September 2004.

  - Mr Y's response dated 20 January 2006 (on Company headed notepaper) advising that, during this lifetime of the SSAS, it had been assumed that the

employer's contribution would be split pro rata to employee contributions; that is, £10,959 to Mr L and £9,041 to Mr Y.

- Mr L had provided a copy of a minute of a meeting of the Board of Directors of the Company, dated 17 February 2020, signed by himself and his wife as directors (the **Board Resolution**). This stated:

  "It was resolved that the total Contributions paid by the Company to the Scheme of £150,000 be 'allocated to [Mr L's] fund within the Scheme, and to [Mr L's] "Accumulated Credit" within the Scheme within the meaning of the Rules'."

- Mr L had obtained legal opinion and the following points were noted:-

  a. It was for the Company and not the Trustees to decide for whose benefit the employer contributions were made.

  b. The Company had resolved to allocate the contributions to Mr L.

  c. Mr Y's letter, of January 2006, had no legal standing because it had been written as a trustee, it was not unanimous, and it conveyed only an assumption as to the allocation of the contributions.

- It understood it was for the Company to determine how contributions were to be allocated between the members. If the Board Resolution was the Company's sole statement regarding the allocation of contributions, it would be reasonable to assume that any employer contributions should be allocated on that basis.

- It understood that there was no prescribed manner in which the Company might make a declaration or determination regarding the allocation of employer contributions; that is, it was not aware of any requirement, either in law or in the SSAS rules, which specified that a board resolution was required to determine allocation of the employer contributions.

- It, therefore, returned to the question of whether Mr Y's letter of 20 January 2006 could be accepted as evidence of the Company's determination of the allocation of employer's contributions. It considered the following to be relevant:-

  - Mr Y was a working director of the Company when he sent the letter.

  - The letter was written on Company headed notepaper.

  - The letter was a direct response to a request to the Company for confirmation of the allocation of employer contributions.

  - There was no evidence of any input from any other Company officers, but Mr Y was the finance director (or equivalent) and was generally authorised to convey Company decisions to third parties.

  - Mr Y had signed the letter as a trustee, but this was likely to be because he believed that this was the appropriate format in which to respond to the SSAS

administrators. It was probably not intended to invalidate his parallel authority as a director of the Company.

- It was reasonable for Rowanmoor to rely on Mr Y's letter as sufficient confirmation from the Company as to the allocation of the employer contributions. However, there was no positive evidence that this was the Company's determination regarding allocation. It would be helpful to consider ancillary evidence.

- It had modelled the fund shares based on the three allocations: the 54.8/45.2% split; the 100% allocation of employer contributions to Mr L; and the 100% allocation of employer contributions and transfer surplus to Mr L. Either of the latter two calculations would mean that Mr Y's benefits had been substantially overstated.

- It noted that Mr L had signed the Trustees' Memorandum, on 15 May 2006, confirming a lump sum of £84,005 and an annual pension of £15,625 for Mr Y. He was also the sole signatory on the fax sent to McMillan & Co, dated 12 June 2006, instructing them to pay Mr Y's pension via the Company's payroll at £1,302.08 per month.

- It accepted that Mr L would not have calculated the fund split himself, but he was a qualified accountant and would have had an intuitive feel for the magnitude of the figures. It was common knowledge that the lump sum represented 25% of the member's fund value. It questioned whether it was reasonable for Mr L to claim to have believed that Mr Y's sole receipts were £86,678 transfer value and £111.27 monthly contribution and yet signed off a lump sum of £84,005; implying a fund value of £336,021. The same applied if Mr L accepted that the transfer surplus had been split pro rata; albeit to a lesser extent. Alternatively, it indicated that Mr L had agreed to the split of employer contributions as indicated in Mr Q's letter.

- On the basis of its experience of small self-administered schemes, the common sequence of events relating to employer contributions was: the directors would decide what contributions should be paid; and the directors would then consider how the contributions should be allocated between the members. It suspected that, whilst the first step had been undertaken, the second step was not. It was, therefore, impossible to know or authentically recreate conversations which took place at the time or to state with any certainty how the employer contributions would have been allocated at the time.

- In its experience, it would normally expect a significant weighting in favour of a shareowner director. A company might view this as, in effect, a distribution of profit to key persons. It might relate to the amount of bonus or dividends payable to each person. Each company was different, so it was feasible that all or none of each year-end contribution could have been allocated to either Mr L or Mr Y.

- A split of 54.80% to Mr L and 45.20% to Mr Y appeared somewhat generous to Mr Y. It would have expected to see a split of 75% to Mr L and 25% to Mr Y. On this basis, Mr Y's lump sum and pension would have been overstated.

- It had been provided with two actuarial reports: 13 September 1999 and 13 September 2002. On the basis of the maximum contributions permitted for each member, as stated in the reports, allocating 100% of the £20,000 per annum employer contribution (in addition to employee contributions) would have meant that Mr L exceeded the maximum contributions limits.

Findings

- Transfer surplus - £85,090

  It was standard industry practice to allocate the value of a transfer of surplus in line with the proportion of each member's transfer sub-fund. Mr L had not produced any evidence that the surplus should have been allocated entirely to his share of the fund. His role in obtaining a share of the surplus did not entitle him to it. The transfer of surplus had been correctly allocated as £24.353 (28.62%) to Mr L and £60,737 (71.38%) to Mr Y.

- Employer contributions

  It was challenging to advise a single correct split of the employer contributions. It depended upon legal advice, which it was unable to provide.

  If the legal advice was that the only method of allocating employer contributions was via a written company resolution signed by all of the directors of the company or a similar document, it would be obliged to conclude that 100% of the employer contributions should be allocated to Mr L in line with the February 2020 Minute provided by Mr L.

  If there had been no reliable evidence for the allocation of employer contributions, it would have advised a split of 75% to Mr L, as a shareowner director, and 25% to Mr Y, as a non-shareowner director. However, it believed there to be sufficient evidence to form a view on the likely split and had, therefore, dismissed this approach.

  The key questions were:-

  - Was it credible that the company directors had, at the time of making the employer contributions, intended the split as set out in the 2006 Letter?

  - Was it correct to rely on unwritten statements and discussion which was later countermanded by the February 2020 Minute?

  It had assumed that verbal agreements between directors did count as a company decision, but would defer to legal advice. If its assumption was correct, it became a question of credible evidence.

It believed:-

- It was more likely than not that Mr Y had discussed the split of employer's contributions with Mr L, either at the time of his 2006 Letter or previously.
- It was not credible that Mr L would have approved the benefits being paid to Mr Y and believed that they were consistent with a 100% allocation of employer contributions to himself. It, therefore, believed that Mr L had agreed the 54.80/45.20% split.
- The actuarial valuation reports indicate that Mr L would have exceeded the maximum permitted contributions for himself on the basis of a 100% allocation of employer contributions.
- Mr L had appeared to accept the 54.80/45.20% split in an email of 8 October 2019 to the Pensions Ombudsman's Office.
- If Mr L had claimed a split of, say, 60/40% or 75/25% in his favour, it would have been harder to dismiss his claim.

Appendix 3

Details of salary and dividend payments

64. Mr L has submitted the following details relating to salary and dividend payments for the period from 1996 to 2003:

	Mr Y Salary	Mr L Salary & Dividends
1996	£31,000	£36,000 & £0
1997	£31,000	£36,000 & £0
1998	£31,000	£36,000 & £27,000
1999	£31,000	£36,000 & £31,000
2000	£31,000	£36,000 & £20,000
2001	£31,000	£36,000 & £20,000
2002	£31,000	£36,000 & £38,000
2003	£31,000	£36,000 & £66,000

Benefits paid to Mr Y between April 2006 and April 2011

65. Rowanmoor provided the following figures to Mrs Y in 2019

Pension commencement lump sum	£84,005
Pension April 2006 to April 2007	£16,601.52
Pension April 2007 to April 2008	£15,624.96
Pension April 2008 to April 2009	£15,624.96
Pension April 2009 to April 2010	£15,624.96
Pension April 2010 to April 2011	£14,322.88
Total	£161,804.28