

## Ombudsman's Determination

Applicant	Mr Y
Scheme	Sotheby's Pension Scheme ( <b>the Scheme</b> )
Respondents	Trustees of the Sotheby's Pension Scheme ( <b>the Trustees</b> ) Sotheby's ( <b>the Employer</b> )

## Outcome

1. I do not uphold Mr Y's complaint and no further action is required by the Trustees or the Employer.

## Complaint summary

2. Mr Y's complaint concerns that, following the buy-out of his Scheme benefits with an insurer (**the Buy-Out**), not all of his pension is being increased to reflect increases in the cost of living.
3. He is also dissatisfied that any Scheme surplus following the Buy-Out will not be used to provide future benefits for members.

## Background information, including submissions from the parties and timeline of events

4. In accordance with the jurisdiction decision communicated to Mr Y on 10 March 2023, my investigation is restricted to the items in the 'Complaint summary' section above. Its scope does not include the discretionary increases applied to Mr Y's pension prior to the Buy-Out.
5. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
6. On 1 November 1983, Mr Y joined the Scheme. On 30 April 1997, he became entitled to deferred benefits.
7. In April 2008, Mr Y reached his normal retirement age of 60 and his retirement benefits were paid from the Scheme.

8. In August 2014, the Trustees issued an 'Important Message about Discretionary Increases' to the members of the Scheme. This said that the Employer had changed its policy on discretionary increases to pensions in payment. The Employer had advised that, in future, such increases would only be granted in exceptional circumstances.
9. On 3 July 2018, the Trustees purchased a bulk annuity policy from Just Retirement Limited (**Just**) in respect of the Scheme's pensioner liabilities. This included the benefits that Mr Y was being paid from the Scheme.
10. On 11 December 2020, the Trustees wrote to Mr Y to inform him that:-
  - Having secured part of the Scheme's liabilities with Just in July 2018, a further policy had been purchased with Pension Insurance Corporation to secure the remaining liabilities.
  - There would be no change to the amount of pension that Mr Y was entitled to from the Scheme.
  - Over the next 18 to 24 months, the Trustees would be overseeing a period of transition after which Mr Y would become the holder of his own insurance policy paying his benefits.
11. On 1 January 2022, the Employer triggered the winding-up process for the Scheme.
12. On 4 January 2022, Lane Clark & Peacock LLP, the Scheme's administrators, wrote to Mr Y. It said:-
  - Following the previous notification he had been sent, concerning his benefits being secured with an insurance company, his Scheme benefits had been secured with Just.
  - A transfer into an individual policy in his own name would take place.
13. On 12 January 2022, the Employer wrote to legal advisers representing the Association of Sotheby's Pensioners. It said:

"... there are not sufficient residual funds in the Scheme to enhance member benefits above members' entitlements by insuring future Pre-1997 discretionary pension increases ...As there are insufficient assets in the Scheme to insure discretionary increases and Sotheby's is not willing to make an additional payment to the Scheme, such increases will not be provided through the insurance policies."
14. On 20 January 2022, Mr Y contacted the Trustees to raise a complaint. In summary, he said:-
  - In the past, discretionary increases had been applied to pensions paid by the Scheme. Under the Buy-Out, the continuance of such benevolence was not

allowed for. His pension had been secured with Just and it had been confirmed that no further discretionary increases would be applied to his pension.

- He had been verbally given to understand by the Employer that these discretionary increases would be safeguarded going forward.
- The Trustees claimed that, following the Buy-Out, there was insufficient surplus available to fund future discretionary increases. However, it emerged that there may have been a substantial surplus that was returned to the Employer and so, was no longer available to be used for the benefit of the pensioners. This was not equitable.

15. On 18 February 2022, Mr Y wrote to the Trustees to provide further comments in relation to his complaint. In summary, he said:-

- While the salaries that the Employer paid were modest, it had always been understood that it would protect its ex-employees as they grew older.
- While the discretionary increases applied historically were unremarkable as individual sums, their cumulative effect would be noticeable by their absence in future years.

16. On 14 April 2022, the Trustees provided their response to Mr Y's complaint which they had considered under the Scheme's two-stage internal dispute resolution procedure (**IDRP**). They advised that his complaint had been considered under stage two of the IDRPP given the upcoming wind-up of the Scheme. They did not uphold Mr Y's complaint, and said in summary:-

- They were not aware of who had provided Mr Y with assurances in relation to how his pension would increase. However, the Trust Deed and Rules that governed the Scheme (**the TD&R**), did not reflect the assurances that he said he had been given.
- Mr Y's pension was made up of six elements. Two of these elements were not subject to guaranteed pension increases. These were:
  - the pre-6 April 1988 Guaranteed Minimum Pension (**the Pre 88 GMP**); and
  - the part of his pension accrued prior to 6 April 1997 which was in excess of his Guaranteed Minimum Pension (**the Pre 97 Excess Pension**).
- The Pre 88 GMP had never been increased. It was Mr Y's Pre 97 Excess Pension that would no longer be considered for discretionary increases. In eight of the last 13 years, no discretionary increases had been awarded.
- The TD&R had always provided for increases on the Pre 97 Excess Pension to be discretionary. The Trustees could only pay an increase on this element of his pension with the consent of the Employer. There was no requirement under legislation to pay such an increase.

- The discretionary increase rule first appeared in the 1994 TD&R. Prior to that, discretionary increases would have been granted under the augmentation and/or special contribution provisions contained in earlier TD&Rs, all of which required the Employer's consent.
  - Mr Y's benefits from the Scheme were being secured by the purchase of an insurance policy (**the Policy**). The Policy would provide the same benefits as detailed in the TD&R. It was being arranged on the basis that all future pension increases, required as of right under the TD&R and legislation, would continue to be paid.
  - They considered that the purchasing of policies to cover members' benefits provided the highest level of security available that benefits would be paid in full. Their view was that this removed much of the risk associated with the provision of these benefits over the long term. So, they considered that the Buy-Out was in the best interests of the membership as a whole.
  - The Scheme's winding up provisions allow for any surplus to be refunded to the Employer by agreement between the Employer and the Trustees. However, it was not expected that there would be any such surplus or refund of one to the Employer.
17. On 29 June 2022, Just wrote to Mr Y to confirm that the policy initially issued to the Trustees had now been assigned to him. An individual annuity policy document was enclosed.
18. The Trustees made the following additional submissions:-
- The TD&R never conferred an entitlement to increases to pensions in payment other than those provided by legislation. However, Rule B22.1 provided discretion for the Trustees to apply additional increases to pensions from time to time. This was subject to the Employer's consent.
  - They had never provided any assurances to Mr Y that discretionary increases to his pension would be secured as part of the Buy-Out. Any increases on his Pre 97 Excess Pension had always been described as discretionary and/or not guaranteed. Mr Y had not provided any evidence to the contrary.
  - They had been required to pay Mr Y's benefits in accordance with the TD&R. The same principle applied when securing members' benefits by the purchase of an annuity. Their role was confined to securing the benefits to which members were legally entitled. Discretionary benefits were not part of members' legal entitlements, so did not need to be secured under the Buy-Out.
  - They were aware that the Buy-Out, which would follow on from the Employer starting the wind-up of the Scheme, would lead to the loss of any further discretionary increases. This had been weighed against the benefits of the Buy-Out. In particular, they considered that delaying the Buy-Out in the hope that

further discretionary increases would be granted was not in the best interests of the membership as a whole. There was no guarantee that any future discretionary increases would be granted. They concluded that it was appropriate to prioritise the increased security offered by the Buy-Out.

- Following the Buy-Out, a small reserve was left in the Scheme to cover anticipated expenses relating to the Scheme winding-up. Once the reserve was exhausted, the Scheme would complete its winding-up. So, there is no surplus to cover future benefits for members.
- Furthermore, even if there was a surplus, the benefits that Mr Y is entitled to have already been secured in full. The Trustees have no power under the TD&R to secure benefits over and above a member's legal entitlement without the consent of the Employer.

## Adjudicator's Opinion

19. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustees or the Employer. The Adjudicator's findings are summarised below:-

- The Adjudicator reviewed the provisions of the TD&R dated 30 March 2004. This was the governing document of the Scheme that was in force at the time that the wind-up took place. Within this document 'the Principal Employer' is defined as being Sotheby's and Clause 19 'Winding Up' states:

"19.2 In the event that:

- (i) The Principal Employer notifies the Trustees of its decision to terminate the Scheme on a specific date [...]

the Scheme shall be wound up [...]"

- So, the Adjudicator's view was that the Employer had the necessary authority to commence the wind-up of the Scheme.
- Rule B22 'Increases in current pension' states:

"B22.1 Any pension or annuity currently payable out of the Scheme shall be reviewed annually and may with the consent of the Principal Employer from time to time be increased by such amount and at such times as the Trustees after taking the advice of the Actuary shall decide.

B22.2 Pensions payable under these Rules shall be increased to such extent and on such dates as is necessary to comply with the provisions of Sections 51 and 54 of the Pensions Act in relation to the increase of pensions in payment."

- The Adjudicator reviewed Sections 51 and 54 of the Pensions Act 1995, an extract from which can be found in Appendix 1. These sections make it clear that certain elements of pension are required to increase under legislation, but this does not include the Pre 97 Excess Pension. So, the Adjudicator's view was that any increases that were applied to this element of Mr Y's pension in the past were discretionary. They would have been subject to the consent of the Employer.
  - As the Trustees confirmed in their stage two IDRPs response of 14 April 2022, all future pension increases that Mr Y was entitled to as of right under the TD&R and legislation would continue to be paid under the Policy. The Adjudicator's opinion was that Mr Y was not entitled to increases as of right on his Pre 97 Excess Pension. This was because there was no requirement under legislation for this element of his pension to be increased and the only increases that the TD&R allowed for as of right were the increases required under legislation. So, the Adjudicator's view was that there was no requirement for allowance to be made for increases on Mr Y's Pre 97 Excess Pension in the terms of the Policy.
  - The Adjudicator acknowledged that, historically, the Employer and Trustees had used their powers to apply a discretionary increase to Mr Y's Pre 97 Excess Pension on a number of occasions. The Adjudicator reviewed historic copies of the Scheme's TD&R and booklets. He found no evidence that the payment of these increases was ever guaranteed.
  - Mr Y referred to 'modest' salaries paid by the Employer and an understanding that it would protect its ex-employees as they grew older. No evidence had been provided of the comments that the Employer may have made and, in particular, whether it said that pension increases on Mr Y's Pre 97 Excess Pension would be guaranteed. Regardless, benefits have to be paid in accordance with the TD&R and, in the event of any discrepancy, the TD&R would prevail.
  - In the Adjudicator's opinion, Mr Y was not correct in saying that surplus Scheme funds following the Buy-Out should be used to provide future benefits. The Adjudicator's view was that the benefits that Mr Y was legally entitled to in the Scheme had been fully secured for him under the terms of the Policy. There was no legal requirement for the surplus, if there was one, to be used to provide Mr Y with benefits over and above those he was legally entitled to.
20. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider.
21. Mr Y provided his further comments in response to the Opinion. In summary, he said:-
- It was unjust that pensions paid by the Scheme would lose much of their intended value over time.

- The Trustees said that there would be no change to the amount of pension he was entitled to as a result of the Buy-Out. However, this was unfair as it took no account of future inflation.
  - In the past, discretionary increases had been applied to his pension. He questioned on what grounds such benevolence had not been continued under the Buy-Out.
  - Funds that should have been used to protect pensioners appeared to have been moved out of the Trustees' control.
  - He referred to an imminent sale being overseen by the Employer, and considered that a percentage of the commission could be set aside for the benefit of the Scheme's pensioners. This could remediate, to a large degree, the impact of there being no future discretionary increases.
22. I have considered the additional points raised by Mr Y, however they do not change the outcome.
23. I agree with the Adjudicator's Opinion.

### **Ombudsman's decision**

24. Mr Y has complained that, following the Buy-Out, he no longer receives discretionary increases on his pension. He is also unhappy that any surplus after the Buy-Out is not being used to secure benefits for members.
25. Having reviewed the TD&R and the provisions of the Pensions Act 1995, I agree with the Adjudicator's assessment that there was no requirement for the Trustees to apply increases to Mr Y's Pre 97 Excess Pension when in payment.
26. I acknowledge Mr Y's disappointment that a part of his pension that had been increased periodically in the past would no longer receive increases under the Policy. However, any such increases had been paid subject to the consent of the Employer and, as such, were not something that Mr Y was entitled to as of right. For this reason, I find that there was no requirement for an allowance to be made within the Policy to provide future increases on Mr Y's Pre 97 Excess Pension.
27. Mr Y said that he was told by the Trustees that there would be no change to the amount of pension he was entitled to as a result of the Buy-Out. I find that this is a correct statement. All the benefits that Mr Y was entitled to as of right under the Scheme, including any guaranteed pension increases, were provided for him under the Policy.
28. Mr Y said that funds that should have been used to protect pensioners had been moved outside the control of the Trustees. The TD&R dated 30 March 2004, an extract from which can be found in Appendix 2, state the options for dealing with any surplus funds after members' benefits have been secured. One of those options is,

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with the consent of the Employer, to make payments to the Participating Employers. I do not find any irregularity in any surplus that was available not being used to provide pensioners with additional benefits.

29. Mr Y has suggested that part of the commission from the Employer's sales could be used to remediate the impact of there being no future discretionary increases. How the Employer uses commission from its sales is for it to decide. For this reason, I am unable to comment any further on this suggestion.

30. I do not uphold Mr Y's complaint.

**Anthony Arter CBE**

Deputy Pensions Ombudsman  
30 October 2023



## Appendix 1

### Extract from the Pensions Act 1995

#### “51 Annual increase in rate of pension

- (1) Subject to subsections (6) and (7) this section applies to a pension under an occupational pension scheme if—
- (a) the scheme—
    - (i) is a registered pension scheme under section 153 of the Finance Act 2004, and
    - (ii) is not a public service pension scheme, and
    - (iii) in the case where the pension becomes a pension in payment on or after the commencement day, is not a money purchase scheme, and
  - (b) the whole, or any part of, the pension is attributable—
    - (i) to pensionable service on or after 6 April 1997, or
    - (ii) in the case of money purchase benefits where the pension is in payment before the commencement day, to payments in respect of employment carried on on or after 6 April 1997, and
  - (c) apart from this section—
    - (i) the annual rate of the pension, or
    - (ii) if only part of the pension is attributable as described in paragraph (b), so much of the annual rate as is attributable to that part,

would not be increased each year by at least the appropriate percentage of that rate.

[...]

- (2) Subject to sections 51A and 52, where a pension to which this section applies, or any part of it, is attributable to pensionable service on or after 6 April 1997 or, in the case of money purchase benefits where the pension is in payment before the commencement day, to payments in respect of employment carried on on or after 6 April 1997—
- (a) the annual rate of the pension, or
  - (b) if only part of the pension is attributable to pensionable service or, as the case may be, to payments in respect of employment carried

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on on or after 6 April 1997, so much of the annual rate as is attributable to that part,

must be increased annually by at least the appropriate percentage.”

## Appendix 2

### Extract from the third consolidated trust deed and rules of the Sotheby's Pension Scheme dated 30 March 2004

“19. Winding up

[...]

19.5 In the event of there being a surplus in the Scheme after allocating benefits in accordance with Clause 19.3 and 19.4 such surplus shall be dealt with in such one or more of the following ways as the Trustees with the consent of the Principal Employer shall decide (unless the Principal Employer shall have ceased to carry on business in which event such consent shall be waived):

- (i) By increasing the benefits provided under Clause 19.3 and 19.4 on a basis certified by the Actuary to be reasonable and equitable.
- (ii) By making payments to the Participating Employers on a basis certified by the Actuary to be reasonable and equitable.”