

## Ombudsman's Determination

Applicant	Mr N
Scheme	Keepmoat Group Pension Scheme ( <b>the Original Plan</b> ); Keepmoat Pension Plan ( <b>the Plan</b> )
Respondents	Keepmoat Ltd ( <b>the Company</b> ); BESTrustees Plc ( <b>the Trustees</b> )

## Complaint Summary

Mr N's complaint is in several parts:-

- The Company and Trustees have failed to pay his benefits in line with his benefit statements;
- They have unilaterally changed the rules of the Plan after his retirement date by removing his entitlement to revaluation in deferment; and
- This has caused him a financial loss, as well as distress and inconvenience, for which he seeks compensation.

## Summary of the Ombudsman's Determination and reasons

The complaint should be partly upheld against the Trustees. In summary, this is because the special terms/underpin (**the Special Terms**) do not form part of the Plan benefits; they are a promise by the Company to pay a certain level of benefits to members outside of the Plan and there is no evidence that they are now being misinterpreted. There is insufficient evidence Mr N has changed his position in reliance on an incorrect benefit statement sent in July 2016 (or other statements). However, the Trustees, who assumed responsibility for providing accurate information, should pay Mr N **£2,000 in respect of severe non-financial injustice** caused by the incorrect statements which were sent to him.

## Detailed Determination

### Material facts

1. In March 1976, Mr N joined Frank Haslam Milan & Co. In May 1977, he joined its final salary pension scheme (**the Original Plan**).
2. In 1982, Frank Haslam Milan & Co was taken over by Bramall Construction Ltd. That company was amalgamated into a group that became Keepmoat Ltd (**the Company**).
3. In February 1992, The Company wrote to Mr N (**the 1992 Letter**). It stated:

“The Company will cease to contribute to [the Original Plan] from 6<sup>th</sup> April 1992. At that date a New Company Scheme will be introduced known as The Keepmoat Pension Plan [**the New Plan**] ...

In [the Original Plan] to be contracted-out it was necessary to provide you with a GMP (Guaranteed Minimum Pension) benefit which was roughly equivalent to the benefits which you gave up by being contracted-out... In [the Plan] your GMP entitlement will be replaced by Protected Rights benefits...

A previous requirement for contracting-out was that members should be guaranteed a benefit of at least 1/80<sup>th</sup> of their final Pensionable Salary for each year of membership. The majority of members can expect their benefits to comfortably exceed this level. This guarantee is no longer required to enable members to be contracted-out and will be dropped for new members joining [the Plan] after 6<sup>th</sup> April 1992. The guarantee will however be continued for existing members, as will the special terms which applied to members who were also members of earlier Company Schemes...

Hence you are assured that membership of [the Plan] will not prejudice your benefits or your dependants benefits if you continue to be contracted-out...”

You should retain this letter and New Plan booklet as these form the Invitation referred to in the Trust Deed which will govern the operation of this Plan.”

4. In April 1992, Mr N joined the New Plan. It was governed by a “Definitive Pension Trust Deed” made between Keepmoat Holdings Plc and other parties on 3 April 2012 (**the 1992 Deed**). Under the 1992 Deed, the Plan would provide defined contribution (**DC**) benefits. Clauses 29 (“Member’s Account”), 30 (“Special Credit”) & 31 (“Fund Credit”) outlined the nature of the benefits. Among other things, Clause 2 said: “The Scheme shall be administered in accordance with this Trust Deed.” (see Appendix) The guarantee was not written into the Rules.
5. Around the same time, a booklet was issued to Mr N, including general information in relation to the Plan (**the Booklet**). Among other things, it said:

“How is my retirement account invested? Your retirement account, together with those of the other members, is invested on behalf of the Trustees by

professional investment managers, either directly or indirectly in a wide range of suitable investments both here and overseas.

You may expect the value of your retirement account to increase because of the appreciation in value of the underlying investments and the addition of further contributions. It should be remembered that the value of investments can decrease in the short term, but over a longer period it is reasonable to expect your retirement account to reflect the normal long term growth of investments in this country and overseas.” [Joining - page 9]

6. “What happens if I used the Keepmoat Pension plan to contract out of S2P? The terms which apply for the purchase of these benefits must be the same regardless of your sex so special rates apply which may be different to those used to purchase benefits with the remainder of your Retirement Account.” [State Pension - page 13]
7. From 1992, Mr N continued to be contracted-out via the Plan, paying full contributions into it, including Additional Voluntary Contributions (**AVCs**).
8. In 1997, a Deed of amendment expressly recognised the ‘special terms’ granted to members in Mr N’s situation; by Deed the Employer and the then Trustees confirmed the contractual obligation contained in the 1992 letter of invitation and the Trustees confirmed acceptance of liabilities to calculate and pay member benefits accordingly subject to receipt by the Trustees of payments by the Employer under the augmentation clause (19(b)) contained in the 1992 Deed. In February 2001, Mr N left the Company.
9. The Plan was administered in-house with advice from Hanover Pensions Plc (**Hanover**). Despite the provisions of the 1992 and 1997 Deeds, the Plan came to be administered as a DB scheme. In 2002, as a result of court order following a divorce, Mr N’s pensionable service in the Plan was reduced by 12 years. From 2002, he received deferred benefit statements showing the benefits he could expect to receive under the Plan, including provision for increases linked to inflation.
10. The statements were issued on Company letterhead by a Company employee who acted as Plan administrator (**the Administrator**) and reported to the trustees of the day (**the Former Trustees**) who were employees/managers of the Company). Statements were signed “for an on behalf of the Trustees of The Keepmoat Pension Plan.”
11. In October 2013, the Former Trustees wrote to Mr N with details of his benefits and outlined three options, ie (1) leave his retirement account in the Plan, (2) transfer out or (3) draw his benefits. Under (3), it said:

“You may draw your benefits before the [NRD] of 65... Based on current market conditions, the value of your 80ths guarantee pension exceeds the value of your main pension account. The current pension, payable from October 2013 would be £13,056 p.a... [NB] the benefits from the AVC account

are payable in addition to the immediate pension quoted above and (b) that the pensions quoted do not include any allowance for future increases.”

12. In January 2016, Mr N arranged an interest-only mortgage for £145,000, to part-fund a divorce settlement. In May 2016, the Trustees were appointed co-trustees of the Plan. Shortly after, they formed the opinion that the Plan was not being run in line with the rules. So, they took legal advice and changed actuarial advisers.
13. In June 2016, Mr N received a Plan statement from the Administrator. It stated: -

“[The Original Plan] was wound up with effect from 5<sup>th</sup> April 1992 and a bulk transfer was paid into [the Plan]. The value of the Retirement Account shown above includes benefits transferred in from the [The Original Plan]... Because you transferred in from [the Original Plan]...you retain the right to a Final Salary Underpin such that your pension (excluding your AVC account) will not be less than the pension based on a formula of 1/80<sup>th</sup> of Pensionable Salary between 1<sup>st</sup> May 1977 and 8<sup>th</sup> February 2001 and a Final Pensionable Salary of £78,000...

This pension will increase in deferment in line with price inflation subject to a cap of 5% per annum until you reach the Plan’s Normal Retirement Age **[NRA]** – 65. Your pension however will not increase in payment. The Final Salary Underpin pension accrued to April 2016 and payable from age 65 is £17,575 per annum. This figure includes an allowance for inflation to April 2016.

If however the Retirement Account can be used to acquire an equivalent pension of a higher level than the Final Salary Underpin you will probably select this option...

Based on current annuity rates the pension you will receive under the Final Salary Underpin is highly likely to exceed the pension that could be secured with your Retirement Account (excluding your AVC account). If you elect to take your benefits from the Final Salary underpin the Trustees will secure your pension by purchasing an Annuity on your behalf...

Illustration of Final Salary Underpin Pension as at 11<sup>th</sup> August 2017... A pension of £17,749.92 a year (£1,479.16 per month). This pension does not increase in payment.”

14. In December 2016, Barnett Waddingham (**BW**) was appointed Plan administrator.
15. In April 2017, the Former Trustees resigned and the Trustees became sole trustees of the Plan. In May 2017, Mr N booked himself and his wife a holiday costing about £6,800.
16. From June 2017, in anticipation of his 65<sup>th</sup> birthday, Mr N contacted BW to enquire about taking benefits. However, it was unable to confirm the correct level of benefits he was entitled to receive or when they could come into payment.

17. At around the same time, the Trustees consulted various parties - including their legal advisers, DLA Piper; BW; and the Pension Protection Fund (**PPF**) - regarding the correct level of benefits payable under the Plan.
18. In July 2017, after reviewing Plan information and other documents provided by the Trustees, the PPF sent them its decision on the status of the Plan. It said:

“The [1992 Letter] informing members of the establishment of the Scheme does not override any terms of [the 1992 Deed] which are inconsistent with it:

  - (a) the February 1992 letter alone is not the Member’s Invitation. The Member’s Invitation comprises the February 1992 letter and the Scheme booklet jointly;
  - (b) the Scheme booklet made no reference to members being entitled to defined benefits or to a guaranteed level of benefits. It instead stated that the balance of the member’s Retirement Account will be used to secure pension benefits additional to the member’s Protected Rights;
  - (c) the February 1992 letter contains the express statement “the Trust Deed will govern the operation of the Plan”. Clause 3 of the 1992 Deed states that it is the 1992 Deed which defines the benefits to which members are entitled...”
19. In August 2017, Mr N contacted BW about taking his Plan benefits. On 25 August, the Company wrote to Mr N. It said:

“As you may be aware, the Company has received a recent decision from the [PPF] which has confirmed that the Plan is not a defined benefit scheme and should not be operated as such...This does not impact on your core benefits under the Plan, which are covered in the separate illustration issued by the Trustees...However, the Company, with the help of external advisers is now seeking to clarify...the implications of the PPF decision. This will look at how benefits should be provided and the nature and scope of those benefits.”
20. After that, there was various correspondence - by phone, email and letter - between Mr N, the Company and the Trustees about the correct level of Plan benefits.
21. On 20 September 2017, Mr N complained to the Trustees under the Plan’s internal dispute resolution procedure (**IDRP**). He said he had been told, via clear statements, that he was entitled to a final salary underpin pension which, as at June 2016, was projected to be about £17,700 a year. This included re-valuation in deferment based on the Retail Prices Index (**RPI**). But he had recently been informed that his benefits were under review. And since then, he had received no further information.
22. On 27 September 2017, the Company wrote to Mr N. It said:

“We note that you have chosen not to take the defined contribution pension due from [the Plan] without the additional benefit set out in the 1992 documentation and this is causing you some hardship. Therefore we would

like to offer to you a non-repayable ex-gratia payment of £1,500 per month from your retirement date...”

23. In October 2017, Mr N received a payment of £4,500 from the Company, ie three payments of £1,500. In November 2017, he received a further payment of £1,500.

24. On 23 November 2017, the Trustees responded under the Plan’s IDR. They said:

“The “Final Salary Promise” or “underpin” is an arrangement between you and [the Company], which your complaint seems to recognise...The Plan is a money purchase scheme which means that...contributions have been invested to build up a fund, your Member’s Account, which provide your retirement benefits. Additional funds are provided by [the Company] to increase your Member’s Account at Normal Retirement Age, if necessary, to give effect to the Final Salary promise...In your case, neither the Trustees or you have had details of your “Final Salary promise” from [the Company]. We have pressed [the Company] for this given your Normal Retirement Date was 11 August 2017, because the Trustee does expect that it could produce a higher pension than your Member’s Account.”

25. On 24 November 2017, the Company wrote to Mr N enclosing a “Notification of Specification”. The letter said:

“...During the process of changing over to a professional trustee and as a result of advice taken by the trustee, it became apparent that there had been some confusion in the manner in which [the Plan] had previously administered the special terms relating to certain individuals who joined [the Plan] in 1992 (the “special terms”). This letter is sent to individuals who have the benefit of the special terms in order to provide them with clarification on those terms.

The trustee has informed [the Company] that it has taken advice on the trust deed and rules and concluded that the special terms do not constitute a benefit under [the Plan]. Instead, the trustee has concluded that in light of this advice, the drafting of the trust deeds and rules, which the trustee is required to follow, means that the special terms exist outside of [the Plan] ...”

26. In the same letter, the Company outlined the accrual rate and pensionable salary underlying the Plan benefits. It said: “The promise is not subject to any revaluation during the period from 5 April 2012 (or the date of leaving the Plan if earlier) to NRA.”

27. In December 2017, Mr N received a further payment of £1,500 from the Company.

28. Unhappy with the Company’s and Trustees’ responses, Mr N referred his complaint to this Office.

29. In March 2018, the Company wrote to Mr N offering to make monthly interim payments of £966.92, so that he would not suffer a financial loss whilst the complaint was under investigation. But it reserved the right to deduct the interim payments from his benefits once the matter was resolved

**Summary of Mr N's position**

30. For more than 25 years, he has been informed, via benefit statements, what his Plan benefits would be based on, and planned his retirement accordingly.
31. It was not until three months after his retirement that he received a revised figure and understood the level of impact the change would have on his retirement plans. The Plan rules were being changed after his retirement. In his opinion, this was not allowed; and, if it was, he should have received advanced warning.
32. Other Plan members who retired before him have been paid their benefits in line with the illustrations, i.e. including revaluation in deferment.
33. The Company has been "grossly unfair, unjust and immoral... and possibly illegal" and its actions have left him in a "dire financial situation".
34. The Company, the Trustees and their administrators have knowingly operated the Plan for 25 years as a defined contributions scheme with a defined benefit underpin. So, by a "long process of use, established by Precedent, in Practical Terms and by Prescriptive Rights...", the Company has established how the Plan operates.
35. The Company has paid him monthly payments of about £1,500 - i.e. the equivalent of about £18,000 a year - which is presumably what it believes he is entitled to.
36. He has requested, but not received, documentary evidence of the Company's claim that the Special Terms sit outside of the Plan.
37. He is entitled to the benefits calculated by the well-documented original method, i.e. by the June 2016 illustration among others.
38. He has seen a copy of the PPF's Determination in relation to the Plan, but is unable to conclude how this affects his case (if it does).
39. Regardless of what advice the Company has received, his benefits ought to have come into payment at his NRD. At his NRD, the Company had no information to suggest his benefits should not be paid in accordance with the statements and other documents he received over the years.
40. As at February 2018, he has received ex-gratia payments totalling £7,500; had his benefits come into payment at his NRD, in line with benefit statements, he would have received about £10,500. So, he has suffered a loss and continues to do so.
41. The Company claims, "The contractual promise does not contain any separate contractual commitment regarding revaluation of the promise", but nor does it specifically exclude such an arrangement.
42. The Company claims, revaluation has never formed part of the promise under the Special Terms, but statements have referred to RPI revaluation in deferment. So, he has received "clear and unambiguous" information to this effect, and the Company should pay RPI in deferment "based on the principle of fair and equitable estoppel".

43. He has relied on such information to plan his retirement and made "serious financial commitments", eg he took out an interest-only mortgage for £150,000, to part-fund a divorce settlement, on the assumption he would receive about £18,000 from the Plan. This income was a key element of the guaranteed income he showed the lender. Had he known his benefits could be only £11,000, his application might have been turned down. He is suffering anxiety at the possibility of being unable to make repayments.
44. In May 2017 he booked a three-week "holiday of a lifetime", costing about £6,800, based on the expected level of Plan benefits. So, he has taken "several other, more minor financial decisions" based on the incorrect information.
45. He has been unable to access his AVC fund of about £32,000, so has suffered a financial loss in the amount of the lost interest on that sum.
46. He does not think his acceptance of the interim payments should result in his future Plan benefits being reduced, which appears to be the Company's position.
47. He wants confirmation that, whatever the Pension Ombudsman decides, he will be no worse off than he would have been, had he taken his Plan benefits at NRD.

#### **Summary of the Company's position**

48. It regrets this situation, which has left Mr N in a difficult position. But since the correct level of benefits has been clarified, he has been able to claim his benefits.
49. It would "find it difficult to argue that the Plan has been administered correctly". It has funded the Plan on the basis that it is a defined benefit scheme. But for some years, it did not know how the Plan was being administered.
50. Mr N is only entitled to receive the correct benefits under the Plan rules. In any case, the trustees, not the Company, are responsible for benefit statements.
51. The Plan has been administered incorrectly which is potentially maladministration, but that does not make the erroneous statements an entitlement to benefits.
52. Benefit statements are not the Company's responsibility. The Company employee who issued the statements was Plan administrator and reported to the trustees. Responsibility for statements lies with the trustees in line with the Occupational & Personal Pension Scheme (Disclosure of Information) Regulations 2013. Insofar as benefits have been mis-stated, it is for the trustees to redress affected members.
53. Mr N has provided no evidence he "carefully planned his retirement on the basis of the incorrect figures". Nor has he provided evidence he has changed his position to the extent that he cannot adapt his situation to the correct level of benefits. In its view, Mr N has suffered disappointment and loss of expectation, but not financial loss.
54. It has not changed the Plan rules. After receiving legal advice, the Trustees concluded, the Plan rules had been mis-interpreted by the original trustees. The Plan is in fact a money purchase scheme. The Special Terms are not part of the benefits. This decision was made by the Trustees, so the Company cannot comment further.



55. The PPF has endorsed the Trustees' view, the Plan provides defined contribution benefits. After obtaining its own advice, the Company clarified, via the Specification, what benefits would be paid; this did not conclude until after Mr N's NRD.
56. The Special Terms are designed to operate "in the manner of" "underpin", ie if the Plan benefits are sufficient to provide the Specification, the special terms are irrelevant. They only become relevant if the performance of a member's retirement account falls short of expectations, and the Plan benefits are insufficient to provide the Specification. In that case, the Company is responsible for meeting any shortfall between the Plan benefits and the Specification.
57. Mr N should be compensated for any distress and inconvenience he has suffered as a result of this matter, but it is for the Trustees to do so. The Company has sought to alleviate any financial hardship by paying Mr N £1,500 per month, totalling £7,500.
58. The Company has proceeded based on the Trustees' findings, and its own legal advice. Accordingly, it is treating the Special Terms as a contractual, unfunded promise from the Company in respect of certain Plan members.
59. The Company wrote to affected members as soon as it understood the correct position, ie in November 2007; it intends to fully honour the terms of the Specification.
60. Mr N argues that RPI revaluation should apply to the Special Terms in deferment. But the Company's position is, revaluation does not form part of the special terms:

“...The promise made is simple in nature. It is referred to as a “guarantee” and is designed to operate as an underpin basis to ensure that members entitled to the promise receive a certain level of benefits (specifically a pension benefit of at least 1/80<sup>th</sup> of final pensionable salary for each year of membership of [the Plan] in the event that their fund within [the Plan] is insufficient to provide that amount. There is nothing in the promise to suggest that the guaranteed amount is anything other than a fixed amount derived from the calculation of 1/80<sup>th</sup> multiplied by final pensionable salary for each year of membership...”

### **Summary of the Trustees' position**

61. The Trustees accept they failed to respond promptly to Mr N's complaint under the IDRP. But most of the matters complained of were not directed at them.
62. After their appointment, they worked with the original trustees to review the Plan documents and administration. Shortly after, they appointed BW, as the in-house administrator was due to retire, and there were some concerns with Hanover.
63. The Plan was established under the 1992 Deed, ie the definitive document governing the Plan, subject to later deeds of amendment. Since the Plan was established, the Rules were clear that it was a money purchase scheme. The benefits payable were limited to the funds in member's Retirement Accounts.

64. When Mr N transferred from the Original Plan to the Plan, he was offered special terms by the Company in relation to his membership, as set out in the 1992 Letter. These special terms pre-dated the Plan and were between Mr N and the Company.
65. Mr N has two potential sources for his pension promise (1) the Plan for all benefits, if the value of his Retirement Account exceeds the Underpin, or (2) a combination of the Plan and Company, if the value of his Retirement Account falls short of the value required to meet the Special Terms.
66. Mr N has received benefit statements detailing the terms of the Special Terms as then understood by the in-house administrator. Benefits have been calculated and paid to Plan members on this basis. These statements were arguably unclear as they failed to explicitly state there were two potential sources of the Special Terms; since the Trustees have been involved, statements have made the two sources of the pension promise clear.
67. The Plan was previously administered on a "confusing" basis, i.e. at times, Hanover viewed it as a money purchase scheme; at others, as a money purchase scheme with a defined benefit underpin. It even paid PPF levies, which were later re-funded.
68. The Trustees obtained legal advice on the Plan rules, and the Special Terms in particular. The advice was that the 1992 Letter did not override the Plan rules; the Booklet formed an "invitation" as defined in the Plan rules. Neither the Booklet nor the Plan rules made reference to defined benefits. The 1992 Letter did not change the fact that the Plan only provides money purchase benefits. Neither did the previous administration of the Plan on a contrary basis.
69. The Trustees must operate the Plan and pay benefits in accordance with the Plan rules. Benefits statements do not bind them and are only intended as a summary.
70. The Trustees felt unable to settle Mr N's benefits until his correct entitlement had been confirmed. Any augmentation is to be provided by the Company. The Trustees accept that resolution of this matter caused a delay in settling Mr N's benefits. But he had also received ex-gratia payments from the Company, so he would not lose out.
71. It was only their appointment as professional trustees in May 2016 that uncovered the issues complained of; at the time, they were only co-trustees and therefore could not stop the June 2016 statements being issued as there was insufficient evidence of any maladministration by the Former Trustees. However, they did persuade the Former Trustees to change advisers and appoint professional administrators/advisers to investigate their concerns; and, this was done promptly, ie in a matter of months.
72. Only once they had the professionals' comments did the full extent of the issues become clearer, after which the Former Trustees resigned and the Trustees became sole trustees in April 2017. They immediately put benefit statements for June 2017 on hold and took significant legal advice. They accept that the Former Trustees administered the Plan incorrectly but they were badly advised by Hanover, whose principal adviser was actually struck off.

73. The Trustees agree that as current Trustees they must pay any sum awarded by the Ombudsman, but stress that they were not culpable for the original situation which arose and once appointed they acted "with great speed" to put things right. They accepted that some Plan members came to believe the Special Terms were part of the Plan, in part because the administrator was in-house and conflated the points. However, once they were appointed - and received legal advice - they completely changed this practice. It would not have been possible for them to have done so in the month after they were appointed co-trustees.
74. It was arguable that they, or someone acting for them, ought to have contacted Mr N before November 2017, to explain that benefits were under review and would have to be delayed. However, this did occur, in August 2017, when the Company contacted Mr N. Further, the matter was highly complex and it is unlikely he would have been prepared to accept that he could not receive benefits in line with prior statements.
75. Mr N was also fully aware of the interim arrangement before November 2017 (though this was not concluded until October 2017); the arrangement also covered the prior three months. So, other than some uncertainty, Mr N did not lose out financially.
76. This is a very difficult case and they were sorry that some Plan members were given statements prior to June 2016 which conflated the Company special terms with Plan benefits. However, they did all they could to promptly investigate and correct this. It was also well-known that they could not pay out benefits over and above members' correct provision under the Plan rules.

## Conclusions

77. The crux of Mr N's complaint is, the Trustees have failed to pay his Plan benefits in line with several benefit statements he has received, and the June 2016 statement in particular. He says they were clear and he was entitled to believe he would receive the level of benefits outlined therein. In general, he says neither the Company nor the Trustees have provided evidence they can unilaterally change the Plan rules after his NRD; in particular, they have not proved that the Special Terms sit outside of the Plan rules, nor that they exclude revaluation in deferment.
78. The evidence indicates, that for some years, there was confusion regarding the administration of the Special Terms, which related to members who joined in 1992. After the Trustees were appointed co-trustees of the Plan, they concluded, on the basis of legal advice, that the Special Terms were not a Plan benefit; rather, they existed outside the Plan as a contractual agreement between the Company and certain employees. Having reviewed the various documents I conclude that administration of the Plan on this basis is correct.
79. The Special Terms were outlined in the 1992 Letter and, as the Company explained in the "Notification of Specification", the drafting of the rules, which they and the Trustees were required to follow, meant the Special Terms existed outside the Plan. This situation is recognised in the 1997 Deed of Amendment, the preamble to which makes clear that it is intending to deal with the consequences of the 1992 Letter

being enforced against the Trustee as a contractual obligation. The Trustee accepts an obligation to pay benefits in conformity with the letter of invitation but nothing in the 1997 Deed of Amendment creates a freestanding entitlement to indexation of the defined benefit underpin.

80. The Company's position, outlined in the Notification of Specification, is that the promise is not subject to any revaluation during the period from 5 April 2012 (or the date of leaving the Plan if earlier) to NRA. Mr N argues that although the Company's position is that the Special Terms do not include separate contractual commitment regarding revaluation, nor do they specifically exclude it. That is true, but as Mr N is bringing this complaint, it is for him to show, on the balance of probabilities, that the pension payments under the Special Terms should be calculated to include revaluation; it is not for the Company and/or the Trustees to show they should not. This is because for a contractual right to exist, an offer of revaluation needs to have been offered and accepted. Unfortunately for Mr N, the 1992 invitation does not contain any offer of revaluation on the guarantee, neither does any of the documentation dating from 1985. I can therefore see no reason to fault the interpretation of the guarantee which is set out in the Specification.
81. The Special Terms were mainly outlined in the 1992 Letter. This stated: "members should be guaranteed a benefit of at least 1/80<sup>th</sup> of their final Pensionable Salary for each year of membership. The majority of members can expect their benefits to comfortably exceed this level. This guarantee is no longer required to enable members to be contracted-out and will be dropped for new members joining [the Plan] after 6<sup>th</sup> April 1992. The guarantee will however be continued for existing members..."
82. The Special Terms are silent on revaluation in deferment; there is nothing in the 1992 Letter, the Plan rules or the correspondence from 1985 to indicate that the guarantee provided under the Special Terms is anything other than a fixed level of benefits derived from the calculation of 1/80<sup>th</sup> multiplied by final Pensionable Salary for each year of membership in the Plan.
83. Mr N has drawn attention to clause 46(c) of the 1992 Deed, which is drafted in terms of revalued DB accruals. While I can see why he might land on this reference, it does not assist him because it is part of a clause which defines the maximum level of benefit the Plan could provide without breaching HMRC rules. It is not a provision which grants a right to a DB benefit with increases.
84. There is no indication the Trustees have changed the rules of the Plan after Mr N's retirement. Rather, the Trustees sought to clarify whether the Plan had in the past been operated consistently with the existing rules and, after taking advice, decided it had not been administered correctly. I am satisfied that the Rules and Special Terms which the Trustee is proposing to apply to Mr N's benefits are those that applied at NRA.

85. Historical incorrect administration of the Plan led to Mr N's being told that he was entitled to indexation on a DB underpin. He was given misleading information about the likely level of those benefits as a result. That was maladministration. However, of itself, an incorrect benefit statement does not give rise to an entitlement to the sum incorrectly stated. What I must decide is, whether Mr N can prove he has suffered a financial loss, or otherwise acted to his detriment, as a result of relying on the 2016 statement, and prior statements containing the same error.
86. I have considered this carefully. However, I find there is insufficient evidence Mr N has suffered a loss as a result of incorrect information contained in the July statement (or other statements). I accept that he planned his retirement generally based on the information received; and, looked forward to receiving benefits at a higher level than the Plan allows. However, on balance I am not persuaded that he has proved that he would have acted differently had he known the correct level of benefits.
87. Mr N has explained, the reason he took out his mortgage was to help fund a divorce settlement. I have seen no evidence that the divorce settlement was connected to the Plan benefits, so Mr N would always have had to pay the settlement. Given the reason he sought to release equity in his home, I consider it more likely than not that he would have taken out the mortgage even had he known the correct pension figure.
88. Possibly, he would have found it harder to obtain such a large mortgage with a lower declarable income but I cannot conclude that having access to the higher loan facility was detrimental to him. If he had taken a mortgage for some lower amount, he would still have had to find the difference - between £150,000, and any notional lower amount - from other sources. If those sources are in fact available to him, it is open to him still to pay off a portion of the mortgage using them.
89. Similarly, I find the holiday would most likely have been undertaken anyway, even if it might have been more modest. On balance, I find that the deciding factor would have been whether Mr N and his partner had sufficient savings, at the time of retirement, to take such a holiday; the future level of retirement income would have been relevant, but it is unlikely such plans would have been abandoned entirely on the basis of a lower projected retirement income.
90. So, I find Mr N has suffered a loss of expectation but has not shown he acted to his detriment in reliance on the misinformation provided to him so as to establish a right to a higher amount of benefit than provided for in the Rules and Special Terms.
91. Mr N says, neither the Company nor the Trustees had any evidence, at his NRD, that the benefits in the June 2016 statement were incorrect, ie they acted incorrectly, and unreasonably, by withholding his benefits for some months. I do not agree. The Trustees were responsible for paying the correct level of benefits under the Plan. Not long after they were appointed, it became clear there had been confusion in the way the Plan had been administered historically, and it was unclear what level of benefits should be paid; the Trustees had an obligation to clarify this. I find that it was



reasonable for the Trustees to put payment of Plan benefits on hold, until the correct position on the Special Terms was clarified, as Mr N was offered interim payments.

92. Mr N's NRD was in August 2017, but not until November 2017 were the Special Terms clarified. Mr N contacted BW on 5 June 2017, two months before his NRD, to enquire about taking benefits, so he had to wait five months to be told what was the correct levels of benefits. I acknowledge that the Trustees were only appointed co-trustees in May 2016, ie one month before the incorrect June 2016 statement; and, they did not actually become sole trustees until April 2017. I also accept that Mr N received notification - from the Company, in August 2017- that the Plan was under a review by the PPF. Nevertheless, the Trustees, or someone acting for them, should have contacted Mr N in or shortly after he got in touch in June 2017, to explain why payment of his benefits would be delayed.
93. As the Company made non-refundable interim payments approximately equal to the monthly sums Mr N had been expecting to receive, ie £1,500 a month, I am satisfied that he did not suffer detriment or hardship while the Special Terms were being investigated. That was fair in the circumstances. I do not find this was an admission by the Company that he should have been receiving this level of benefit all along.
94. The Company has explained that since the Special Terms were clarified in November 2017, Mr N has been able to take his benefits but has chosen not to. It has continued to offer a reduced interim payment at a level closer to Mr N's true benefit entitlement, on the basis that these can be recovered from the pension when it is put into payment. I find no reason to fault that approach. I understand Mr N is concerned not to lose out on any benefits to which he is entitled, but I see no reason to delay claiming benefits past the point where the situation was clarified. In any case, I understand Mr N has now claimed his Plan benefits, and these have since come into payment.
95. Turning now to the effect of the maladministration on Mr N, his benefit levels were misrepresented to him over a long period of time. It is clear that for many years, he was led to anticipate a level of benefit which was over a third higher than what was actually available. The issue became apparent to him as he was in the process of seeking to retire and delayed his ability to do so with finality. That situation must have come as a great shock and will have caused him severe distress and inconvenience.
96. I acknowledge that the maladministration commenced long before appointment of the Trustees, albeit it continued for a shorter time after their appointment. I find responsibility for issuing statements lay (i) with the Former Trustees alone before May 2016, (ii) jointly with the Former Trustees and the Trustees from May 2016 to April 2017 and (iii) with the Trustees alone after April 2017. I accept that the Trustee was not responsible for the original situation which arose and took prompt steps to resolve it once appointed. I acknowledge the Trustees' submission that the Former Trustees were responsible for the original situation which arose and that they may themselves have been misadvised by someone who is not a party to the complaint. I have also considered that, in this particular case, the Former Trustee may be legally

indistinguishable from the Employer. I acknowledge all these points, but do not consider it necessary to make further enquiries or findings because the Trustees have helpfully indicated that, notwithstanding the points which they raise, they do not object to the direction which I propose to make in order to address the overall injustice to Mr N.

97. I therefore direct that the Trustees should make an award to Mr N in recognition of the severe distress and inconvenience he has experienced because of the totality of the incorrect statements which were issued to him about the level of his benefits.

**Directions**

98. Within 21 days of the date of this Determination, the Trustees shall pay Mr N £2,000 in respect of severe non-financial injustice.

**Karen Johnston**

Deputy Pensions Ombudsman  
15 January 2020