

**PENSION SCHEMES ACT 1993, PART X**  
**DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN**

<b>Applicant</b>	Mr David Pusinelli
<b>Scheme</b>	Close Brothers Limited (1979) Pension Plan
<b>Respondent(s)</b>	Close Brothers Group Plc, Trustees of the Close Brothers Limited (1979) Pension Plan ( <b>the Trustees</b> )

**Subject**

Mr Pusinelli complains about changes made to his pension plan

**The Deputy Pensions Ombudsman's determination and short reasons**

The complaint should not be upheld against Close Brothers Group Plc or the Trustees of the Close Brothers Limited (1979) Pension Plan because there does not appear to have been any breach of law or maladministration in respect of the rules. Even if there was maladministration with regard to past practice, the Trustees are now administering the Plan correctly and Mr Pusinelli has not suffered any loss from any past failure to do so. There is no contractual entitlement as claimed by Mr Pusinelli.

## DETAILED DETERMINATION

### Material Facts

1. Mr Pusinelli was an employee of Close Brothers Ltd (**Close Brothers**) and in 1988 became a member of the Close Brothers Limited (1979) Pension Plan (**the Plan**). The Plan was established by an interim deed in 1979, with a definitive deed issued in May 1982. There were several supplemental deeds, consolidated in a single definitive deed in March 2012.
2. He became a trustee in 1992. In the mid-1990s the Plan was closed to new members.  
In 2002 he became group executive director of Close Brothers Ltd.
3. A review of the Plan revealed that there was no supplemental deed to deal with equalisation of normal retirement age between male and female members of the Plan following the European Court of Justice ruling in the ‘Barber’ case that the retirement ages should be the same for men and women. The Trustees had believed the issue had been dealt with but it became apparent during 1995 that it had not been. A notice was sent to all members in December 1997 advising of a new uniform normal retirement age of 65 for all members, with a normal retirement age of 60 applied for all employees up to November 1997. In spite of that announcement, the Plan rules were never amended to reflect this.
4. In 1995, the Members' Handbook stated that deferred pensions would be increased by 5% a year from the date of leaving employment up to payment of the pension (except for any Guaranteed Minimum Pension element, which would increase at 7%). The Handbook also contained the following statement:  
  

“We have been careful to make this brief description of the Plan as accurate and complete as possible. However, it must be stressed that nothing in this booklet can override the provisions of the Trust Deed and Rules and other amending documentation.”
5. The Booklet also stated that although the intention was to maintain the Plan, it might be amended from time to time or even discontinued.
6. In 2002, three individuals (including Mr Pusinelli) were approached about possible changes to their pensions. They were all senior executives. This was not a formal process but a proposal was made that their pensionable salaries be frozen at

current levels with future salary increases benefiting from a fixed money purchase contribution to a personal pension.

7. Mr Pusinelli says he was told if he agreed to the proposal no other elements of his pension would be reduced. He challenged the proposal the basis that, if he agreed, and continued in employment, his pensionable service would continue but would only add 3% each year to its value whereas if he left his employment, he would have a deferred pension increasing by 5% per year.
8. There was further discussion and Mr Pusinelli says an agreement was subsequently reached which capped his pensionable salary but gave him a guaranteed right to his deferred pension being revalued by 5% each year. This was not, however, confirmed in writing and no amendments were made to the Plan rules, so there is no documentary evidence that such an agreement was entered into. Shortly after this he was given a new service contract dated 26 September 2002. Clause 8.1 of the contract dealt with his pension entitlement. It did not include any reference the arrangements he says were agreed.
9. Typically, benefit statements routinely said that deferred pensions were increased by 5%. This was the established practice over 25 years. The practice for pensions in payment was to increase them by 3% per year.
10. In 2003, Close Brothers wrote to all active members seeking consent to a change in their benefits, with an annual cap on increases to pensionable salary of the lower of inflation or 2%; increases in pensions in payment to be capped at 2.5%; and revaluation of deferred pensions to be capped in line with inflation subject to a cap of 5%, meaning the guaranteed rate of 5% was to be removed. Most members accepted the changes. They were referred to as the '2003 consenters'.
11. In 2008 the Trustees commenced a review of the administration of the Plan with a view to consolidating the Plan's trust deed and rules. During that process it came to light that as a result of the failure to equalise benefits properly in 1997, benefits were not being administered in accordance with the Scheme rules. In particular, the Trustees and Close Brothers considered that
  - 5% revaluation had been applied to deferred members, but there was no provision for this in the rules and in fact they were only entitled to statutory revaluation;

- pensions in payment in respect of post-2005 service for some members had been increased by RPI capped at 5% with a minimum of 3%, but these members were only entitled to a fixed 3% increase;
  - GMP increases had been fixed at 3% when they should have been capped at 3% for increases up to 1 January 2011, and CPI capped at 3% for increases after that date.
12. Also in 2008, Mr Pusinelli left the employment of Close Brothers. He entered into a compromise agreement with Close Brother, under which he received a payment of money in return for waiving all further claims he might have against the company arising out of his employment, including any claim “in relation to accrued pension entitlements.”
13. The Trustees’ and Close Brothers’ respective solicitors jointly instructed Counsel to advise on the correct way to administer the Plan. The advice confirmed that equalisation had not occurred in 1997. Counsel further advised that the correct benefits entitlement was determined by
- the Plan rules;
  - relevant statutory provision; and
  - any contractual variations.
14. There had been some changes to benefits in 2002 and 2003, to which some members had consented, and those needed to be considered.
15. Counsel confirmed that the Trustees’ and Close Brothers’ view was correct. Deferred members who had received 5% revaluations would now receive a lower level, since the 5% rate was never contained in the rules; therefore the statutory rates should apply. The relevant statutory provision are sections 83 to 86 of the Pension Schemes Act 1993 (as amended by the Pensions Act 2004), which required revaluation by the lower of
- the change in the consumer price index; and
  - 5% in respect of service before 5 April 2009 and 2.5% for service after that date.

16. It was not clear why the practice of a 5% rate had been adopted, but the Trustees and Close Brothers felt this was likely due to either a misinterpretation of the rules or simply due to inflation then being more than 5%, so the intention was to continue at that rate when inflation fell.
17. Counsel advised that there was no case for arguing estoppel by convention; this required positive action by all parties concerned and mere passive acceptance of certain assumptions was not enough. For an individual member to claim estoppel by representation, there would have to be evidence in that person's particular case of a clear representation being accepted by the member, to their detriment. The booklet could not be a clear representation since it was specifically said to be for illustration only. Since members had been receiving benefits greater than their entitlement, it would be difficult to show any detriment.
18. At the conclusion of the review, the Trustees and Close Brothers agreed that any past revaluations should not be changed but going forward, revaluations from 2011 would be at the correct rate. The Trustees adopted a new definitive Trust Deed and Rules dated 26 March 2012. The new rules include provision for revaluation of deferred pensions as follows:

Rule 8.2

Each deferred pension (other than the GMP...) payable to a member who is not a 2003 Consenter under Rule 7 (Deferred Members) will be increased at the Member's Normal Retirement Date as follows: -

(A) at the rate of 5% per each Revaluation Period ending on or before 31<sup>st</sup> July, 2011; and

(B) in respect of each Revaluation Period ending after 31<sup>st</sup> July, 2011;

(1) in respect of Pensionable Service before 6<sup>th</sup> April, 2009 in accordance with the Revaluation Laws; and

(2) in respect of Pensionable Service on or after 6<sup>th</sup> April, 2009 at the lower of CPI or 5% save that the rate of revaluation applicable at 8.2(B)(1) above will apply if lower.

19. Mr Pusinelli pursued complaints with the Trustees under the Internal Dispute Resolution Procedure and with Close Brothers but his complaints were not upheld. In correspondence, Close Brothers' solicitors referred to the fact that

Mr Pusinelli had signed a compromise agreement with Close Brothers, under which he is not entitled to make any further claim against the company.

### **Summary of Mr Pusinelli's position**

20. Mr Pusinelli says Close Brothers are now refusing to honour the agreement reached with him; he has had revaluation of his deferred benefits and future increases in his pension in payment reduced.
21. Mr Pusinelli's case is that he has two grounds for claiming entitlement to a fixed 5% revaluation of his deferred pension – a claim arising from maladministration over 25 years and a contractual claim arising under his contract of employment. The benefits he claims to have been incorporated by oral contract are the same as those historically provided to all members.
22. With regard to the claim based on maladministration, it is a fact that for 25 years the Plan provided a fixed 5% revaluation of deferred benefits. This was well known to senior company executives, the Trustees and scheme actuaries and communicated to members as a guaranteed benefit. But it was not reflected in the trust deed and rules.
23. He considers the revaluations of benefits communicated to members over the years were regarded by Close Brothers and the Trustees as entrenched but due to error, these were never enshrined in the Plan rules. The Trustees have presented this practice as a mistake on the part of all parties involved and have legal advice that they are entitled to adhere to the Plan rules, which provide no such benefit. His position is that the error was in fact by Close Brothers, as administrators, in failing to update the Plan rules; the provisions in the rules were in fact incorrect and should have been updated by way of rectification to ensure they reflected the true position. It cannot be right that they can rely on their own negligence to repudiate benefits which they have been explaining to members for years.
24. He has been saying consistently for years that Close Brothers and the Trustees failed to update the Plan documentation to reflect the agreed practice. The original 1982 deed should have been rectified to reflect what was actually agreed, put into practice and followed for 25 years.

25. It is not correct to say that Close Brothers and the Trustees believe the practice being followed was simply a mistake; that may be the view of the current Trustees and directors of Close Brothers, but it was not the view of those in office at the time. However, no-one has sought to interview the relevant office holders or obtain their views on this.
26. It is true the Members' Handbook contained a statement that it did not override the Plan rules. However, given the discrepancy between the Plan rules and the booklet, the statement that "We have been careful to make this brief description... as accurate and complete as possible" is hard to sustain. Whilst the Handbook may not formally override the Plan rules, there is nothing to counter the argument that, taken in conjunction with other evidence, it contributes to the conclusion that the wording of the Plan rules manifestly did not express the intentions of the relevant parties. The Handbook and the annual statements of benefits confirmed the entitlement to a 5% revaluation and amounted to a promise that this would continue.
27. The respondents say there was no purpose in conducting interviews with former officers or trustees as there was no document to rectify. But the document to be rectified was the 1982 trust deed and rules. Mr Pusinelli says that when he challenged, in the meeting with Counsel, why other company officials or trustees had not been interviewed, he was told it would be a waste of time because they could not help in the context of the equalisation issue.
28. Mr Pusinelli says he has difficulty providing convincing proof of the intention of the parties if there is persistent refusal to seek evidence from them. Mr Pusinelli relies on evidence given by Leslie Bland, a former trustee, Robin Sellers, former trustee, group company secretary and financial controller and Peter Winkworth, an early trustee and finance director of Close Brothers Group plc. Their view is that revaluing deferred pensions by 5% was intentional and that the error arising was a failure to update the trust deed and rules accordingly. Mr Pusinelli invites enquiries of these witnesses (including a Mr Keogh, former chief executive of Close Brothers Group plc).
29. The respondents have commented on a lack of specific detail as to how and when a decision was made to augment pensions. The answer is that it was decided a long time ago, but as he does not have access to company documents

he cannot trawl through them to find the evidence. His belief is that funding of the Plan had been based on this premise since the late 1980s, prior to his period in office. He joined Close Brothers in 1986 and recalls a conversation around that time with the group finance director (and trustee) to the effect that salaries and bonuses were below market rates because a fledgling merchant bank could not compete with established banks but the pension benefit was very generous.

30. With regard to his contractual entitlement to revaluation of 5%, this arises out of an agreement entered into in 2002. He agreed with Close Brothers to a compromise of his pension benefits in order to curtail the cost to the Plan. The negotiations were pressured and no legal advice was sought. The final terms were never documented in any signed agreement or reflected in his service contract or the Plan rules. This was an oral contract, the terms of which Close Brothers is now seeking to dispute. Its position is that the lack of documentation – for which it is responsible – enables it to ignore the protection to the deferred revaluation benefit which the oral agreement provided, whilst preserving the pensionable salary capping mechanism that was a major sacrifice to him.
31. In his view, in the absence of written confirmation of the agreement, one of two scenarios must now apply. The first is that the discussion led to the creation of an oral contract that overrides the Plan rules. This agreement included a clear commitment to maintaining the guaranteed pension augmentation at a fixed 5% per year and committed Close Brothers to the future application of this augmentation. The second possibility is that if the terms of the agreement cannot be agreed then no fragment of it should be binding and the whole agreement is null and void. In that case, the capping of his pensionable salary is not valid.
32. The service contract of September 2002 did not include reference to the guaranteed 5% revaluation. But it also did not include provision for his pensionable salary to be capped and suggested he paid 5.3% of his salary into the Plan when in fact it was only 5.3% of his pensionable salary.
33. The Remuneration reports needed to draw attention to any proposed increase in benefits. Any reduction in benefits would have been the subject of negotiation and disclosure. There was no need for the Remuneration reports to summarise the various other benefits membership already conferred because they were not being adjusted. Nor was there any need to refer to “special terms relating to



deferred pension” because there were no special terms. He and all other members except the 2003 consenters continued to have their benefits funded on the assumption of an annual 5% increase in deferred benefits.

34. He accepts there is clear evidence of a consensus on the payments flowing from the capped salary proposal. This was also not formally documented but was only one part of the oral agreement and, in the absence of agreement between the parties, is at risk of being rendered null and void.

### **Summary of the Trustees’ and Close Brothers’ position**

35. The Trustees’ view is that the review discovered a failure to equalise benefits properly in 1997 and also that some benefits were not being administered in accordance with the rules. Deferred benefits had been revalued at 5% per year even though they were only entitled to statutory revaluation. Pensions in payment in respect of post-2005 service had been receiving increases of RPI capped at 5% with a floor of 3%, but these members were only entitled to a fixed 3% annual increase. Finally, GMP increases had been fixed at 3% when, for increases prior to January 2011, the increases should have been RPI capped at 3% and for increases from 1 January 2011, CPI capped at 3%.
36. Close Brothers’ and the Trustees’ aim was always to ensure the Plan was administered properly. The starting point must always be the rules. These were silent as to revaluing deferred benefits. Information in the Booklet could not override the rules. As the rules were silent, sections 83 to 86 of the Pension Schemes Act 1993 applied and required that deferred pensions be revalued by the lesser of:
  - (i) the change in the consumer price index (CPI); and
  - (ii) 5% in respect of service before 5 April 2009 and 2.5% for service after that date.
37. In practice, however, the Trustees had simply been revaluing deferred benefits by 5%, which was not supported by the rules or by statute. At the conclusion of the review, a new definitive trust deed and rules was adopted. For the purposes of that deed Mr Pusinelli is in the category of ‘2002 consenter’. The new trust deed provides for the revaluation of his deferred pension at rule 8.2.

38. Mr Pusinelli is now saying for the first time – despite being a trustee for more than 20 years – that the Trustees (including him) and Close Brothers failed to update the Plan documents. Rectification is only possible where there is convincing proof the document does not represent the common intention of the parties and the burden is on the person seeking rectification to demonstrate this convincing proof. So Mr Pusinelli would have to provide convincing evidence that all parties had a common intention that a deed of amendment should make the necessary amendments to give effect to the fixed rate of revaluation he is now seeking.
39. Mr Pusinelli has not identified any particular document that should be rectified. Rather he is saying that, looking at the whole situation with the benefit of hindsight, an additional deed should have been prepared to document this right.
40. When the review took place, it established that there were several errors in administration. The mere fact there have been errors in administration does not confer a right.
41. Mr Pusinelli also claims the administrative practice is evidence of a decision to augment members' pensions, but there is no detail as to how or when such a decision was made either by the Trustees or Close Brothers. If there had been a decision to do this, one would expect some evidence of this, including consideration of the costs implication. There is no such evidence.
42. The Trustees do not accept there was a contractual entitlement as a result of his position as a 2002 consenter. As there is no documentation to support this Mr Pusinelli was asked to provide specific details of any representations to him including who made those representations, when and how. There is, however, no clear evidence of any representations made to him. The summary of events he has provided focuses on the proposal to freeze his pensionable salary, which arose in connection with his promotion in 2002 to the Board and substantial salary increase he received as a result. At most, this suggests Close Brothers was confirming that deferred benefits would continue in accordance with the trust deed rather than committing to maintain indefinitely a specific level of benefit which was at that time being provided mistakenly.

43. There is no documentation in his terms of employment or anywhere else that guarantees 5% revaluation. In fact the minutes of the Remuneration Committee of 11 September 2002 states that the points being agreed are:
- (a) “to permit inflation of the promissory element of the pension at RPI capped at 2%”; and
  - (b) “contributions for each of [the three] will be made into the Close Brothers Holding Money Purchase Scheme at the rate of 25% of the difference between actual salary and the adjusted promissory pensionable salary. This is agreed.”
44. At no point in any of the annual remuneration reports for Close Brothers, which summarised the remuneration arrangements for each director, including Mr Pusinelli, was there a reference to any special terms concerning deferred pensions. No other Plan members have such a guaranteed right to a fixed 5% revaluation. The remuneration report for 2003 specifically says that pensionable salary for Mr Pusinelli and the two others concerned “has been set at their salary at 1<sup>st</sup> August, 2001 plus increases to reflect inflation to a maximum of 2% each annum”. Similar wording was used in each report from 2004 to 2008. As a director Mr Pusinelli was jointly responsible with the other directors for ensuring the annual report was correct.
45. Since 2002 Mr Pusinelli’s contributions whilst an active member were calculated by reference to his capped pensionable salary. Additional contributions to the defined contribution scheme were calculated by reference to his salary in excess of the cap. So it is clear from the summaries in the annual reports and the payments that were actually being made that the mechanism to cap his pensionable salary was agreed. These arrangements were also confirmed in the A Day pension review undertaken for Mr Pusinelli in September 2005, which stated that
- “Scheme pensionable salaries were frozen in August 2001. These amounts are increased each August by the lower of RPI or 2%. Currently your scheme pensionable salary is £241,425... In addition you are a member of the Close Brothers Holdings Pension which is a defined contribution scheme. This is a top up arrangement put in place for four main board directors who are members of the final salary scheme. This scheme receives contributions on the same basis as

above but only in respect of basic salary in excess of that pension in the final salary scheme (i.e. currently £315,000 less £241,425)."

46. It is assumed Mr Pusinelli is not asserting it was agreed his benefits would be administered on the basis of the mistaken understanding of his legal entitlement, ie that he contractually agreed to an unequalised benefit as opposed to the higher benefit payable to him as a result of the discovery that normal retirement ages had not been equalised. His cash equivalent transfer value at 30 May 2012 gave a total deferred pension of £113,001.80 and total transfer value of £3,264.553. Had it been calculated on the basis being mistakenly applied before the review, with a fixed 5% increase but no equalisation of benefits for post 1997 service, the transfer value would have been lower – at £3,086.573.
47. There is considerable documentary evidence confirming these arrangements. In contrast, there is no contemporaneous written evidence of a term that Mr Pusinelli's deferred pension would be revalued at a fixed rate of 5%. In the context of seeking to reward performance and retain a key executive, it would have been very unusual to have such a term, which would only be of benefit to him if he left his employment and became a deferred member. The only evidence Mr Pusinelli is entitled to any special contractual terms as to revaluation of his deferred benefit is his recollection, which is at odds with all the other available evidence.
48. The current method of revaluation is consistent with Rule 8.2 of the trust deed and rules and the Plan's statutory obligations. The Trustees could in fact have revalued benefits correctly for the whole of his service, but it was agreed with Close Brothers that the revaluation up to 31 July 2011 would not be corrected. The Trustees have significantly enhanced his benefits compared to those he would have been entitled to under the terms of the original trust deed.

## Conclusions

49. Mr Pusinelli puts his case forward under two claims – the first that his entitlement arises from the maladministration in the way the Plan was run, and the second that it arises from a contractual agreement.

*The maladministration claim*

50. The starting point for any consideration of Mr Pusinelli's entitlement is the Plan rules. The Explanatory Booklet could not give rise to any entitlement. Such documents are merely an attempt to summarise the provisions of a pension scheme; except in very limited circumstances, they do not override the Trust Deed and Rules and this was emphasised in the Explanatory Booklet. The fact that the Trustees administered the Plan incorrectly may be maladministration, but it does not confer any rights for members - their rights are as set out in the Plan rules.
51. Mr Pusinelli has also referred to benefit statements provided over the years. The statements were correct at the time they were issued, since at those dates revaluation was being applied at the rate of 5%. But all these statements did was to reflect the practice at the time; they did not provide any entitlement other than in accordance with the Plan rules. A benefit statement is only an estimate of the amount an individual can expect to receive and different statements gave different estimates to him.
52. The difficulty here, of course, is that the Plan rules did not include provision for revaluation. In that case, statutory provision comes into play. Sections 83 to 86 and Schedule 3 of the Pension Schemes Act 1993 (as amended) stipulate minimum levels of revaluation. Some pension schemes offer more generous rates but since the Plan rules did not contain any provision for revaluation, the statutory provisions should have applied. So Mr Pusinelli's pension should have been revalued in accordance with the relevant provisions of the Pension Schemes Act. The effect of those was to require revaluation by the lower of the change in the consumer price index and 5% in respect of service before 5 April 2009; and 2.5% for service after that date. The practice adopted gave higher increases, so he has not suffered any loss to date - in fact he has benefitted from the failure to administer the Plan correctly in the past.
53. The Trustees have taken legal advice and, following this, have amended the Rules. The change is not retrospective, so Mr Pusinelli will retain the benefit of the higher rate used in the past. Going forward, the rules do now set out the basis for revaluation as from 2011. The rules have been amended correctly and his pension will now be revalued in accordance with the rules.

54. Mr Pusinelli has not specifically put forward an argument based on estoppel. But he does say the Trustees should be bound by the promises made to him over the years as to how his pension would be revalued, which may be taken to be an estoppel argument.
55. To succeed with an argument that the Trustees should be estopped from going back on their 'promise', Mr Pusinelli would have to show not only that there was a clear and unequivocal statement made to him, but also that he relied on that to his detriment.
56. For the reasons set out above, I do not consider there was a clear promise made to Mr Pusinelli. The Explanatory Booklet was very clear that it was only a summary, it could not override the Plan rules, and the Plan could be amended or even discontinued. The benefit statements were only statements of current practice and estimates of future benefits. Neither gave a guarantee that revaluation would always be carried out in a certain way. But even if they had, Mr Pusinelli has not acted on them to his detriment – he has not made any decisions, acted in a different way or suffered any loss as a result of any of these documents.
57. There is a more fundamental obstacle to Mr Pusinelli being successful in a claim based on estoppel. For any estoppel there is a distinction between the party to be estopped and the party claiming the estoppel – the court has confirmed that “where the persons claiming to have been deceived by a statement are in effect the same as those who are alleged to have made it, there is no representation which the law can recognise...”
58. Mr Pusinelli was a trustee of the Plan and, from 2002 onwards, a director of Close Brothers. Any representations which might have been contained in statements made by the trustees were in effect made by him. As a director of the company, he was responsible for any information in documents such as remuneration reports. His involvement at senior levels in the board of Trustees and in the company undermines any argument that it would be unconscionable or unjust for either the Trustees or Close Brothers to go back on any representations that may have been made.

59. Mr Pusinelli also claims that the Plan rules should have been rectified to correct the error in omitting the entitlement to a 5% revaluation of deferred benefits. If Mr Pusinelli were to seek a rectification of the deeds he would have to prove that all parties had a common intention that a deed of amendment should make the necessary amendments to give effect to the fixed rate of revaluation he is now seeking. . He considers that the witnesses' evidence (paragraph 28 above) supports such a conclusion. I note that most of the pension rectification cases have concerned situations in which scheme documents have provided for a higher level of benefit than had been intended. This is not the case here. Notwithstanding, simply because there is a shared belief that it was intended that members should benefit from a 5 % revaluation does not mean that if it was known at the time that the rules were actually silent on the point, they would have been amended accordingly. . The Plan rules were silent, so it would be hard to demonstrate that the Plan was not intended to have the meaning which a literal reading of the words would imply. In any event, assuming I could direct that the Plan rules be rectified, I would decline to do so. Other Plan members, who may be adversely affected by my decision, for example because of cost implications, would not have had an opportunity to make representations or be bound by my determination. It follows that I could not properly make such a direction limited to Mr Pusinelli.

*The contractual claim*

60. This claim arises from an alleged oral agreement entered into in 2002 between Mr Pusinelli and Close Brothers' finance director, which he says overrides the Plan rules. The agreement was never recorded in writing either in his service contract or any other document.
61. Although the Plan rules could not be altered by means of a contract between Mr Pusinelli and Close Brothers, it was possible for his employer to enter into a contractual agreement with Mr Pusinelli to provide benefits or rights in excess of those to which he was entitled under the Plan rules. For a contract to exist, however, all the elements must be present - an offer, an acceptance, consideration and an intention to enter into legal relations, together with clear evidence as to the terms of the contract.

62. There was no written evidence of any contract. Mr Pusinelli is relying on there being an oral contract and in the absence of any other evidence he is effectively relying on his own recollection of events at the time. That is not a satisfactory way to prove not only that there was a contract, but what the terms of that contract were.
63. The available evidence is as follows:
- The service contract dated 26 September 2002, which makes no mention of the alleged agreement
  - Minutes of the Remuneration Committee of 11 September 2002, which record that there would be inflation of the promissory element of the pension at RPI capped at 2% and contributions made to his new defined contribution pension at 35% between his actual salary and the promissory pensionable salary
  - The Remuneration report for 2003, which stated that his pensionable salary had been set at 1 August 2001 plus increases up to a maximum of 2% per year.
  - Similar wording in remuneration reports each year from 2004 to 2008
  - Contributions on Mr Pusinelli's salary, which were calculated by reference to his capped pensionable salary, with additional contributions to the new defined contribution pension based on the excess salary
  - The A Day review, which confirmed the above arrangements.
64. Taken together, this body of evidence is enough to show that new arrangements were established in 2002, put into effect and followed each year from then on. Those arrangements were that Mr Pusinelli's pensionable salary was capped; contributions to the Plan were paid on that capped salary and additional contributions paid into the new defined contribution pension separately. So whilst there is no documentary evidence supporting Mr Pusinelli's claims that he and the finance director agreed he was entitled to a guaranteed 5% revaluation of deferred benefits, there is a wealth of evidence confirming the respondents' views. On balance, I am satisfied it is more likely than not that Mr Pusinelli's



pension arrangements are those argued by the respondents and supported by a range of evidence. There is no support from the witness's evidence (paragraph 28 above) that a contractual claim arose. I do not consider that I need make further enquiries on the point. Judicial prudence is clear that I may reach findings on the balance of probabilities.

65. Mr Pusinelli refers to there being "no change to his other benefits". I consider this simply reflects that the change being agreed was the change to the definition of his pensionable salary; everything else remained as per his entitlement under the Plan and he was never entitled under the Plan rules to a guaranteed 5% revaluation.
66. I have considered whether the compromise agreement prevents Mr Pusinelli making a claim against Close Brothers. In the agreement, he is said to have waived any claims against the company including claims in respect of accrued pension rights. I do not consider it possible for him to waive claims to accrued rights. A member's entitlement or accrued right to a pension cannot be surrendered. But this does not prevent parties from making, or the court from approving or enforcing, a genuine compromise of disputed entitlements or rights. A claim to a revaluation of deferred pensions is not an accrued right; the right to an increase in a deferred pension at a particular rate is not an entitlement or an accrued right until the calculation has been done. So it was possible for this disputed entitlement to be waived. In the circumstances, even if Mr Pusinelli did have a valid claim against Close Brothers, he has waived his rather to bring that claim. Indeed the whole purpose of a compromise agreement is to bring an end to further claims between the parties. Where they have negotiated the terms under which the employment ends, I would not seek to undermine that agreement.
67. Of course, the agreement was only between Mr Pusinelli and Close. It does not prevent any claims against the Trustees. However, there does not appear to have been any breach of law or maladministration in respect of the changes to the rules. But even if there was maladministration with regard to past practice, the Trustees are now administering the Plan correctly and Mr Pusinelli has not suffered any loss from any past failure to do so – the Trustees have agreed with Close Brothers that the new Rule 8.2 will only apply from 2011 and that previous fixed rate has been preserved for periods of service up to then.

68. I have no doubt that Mr Pusinelli holds his beliefs honestly but for the reasons explained above, I do not uphold any part of the complaint.

**Jane Irvine**  
Deputy Pensions Ombudsman

28 November 2014