

## Ombudsman's Determination

<b>Applicant</b>	Mrs ■
<b>Scheme</b>	Kingfisher Pension Scheme
<b>Respondent(s)</b>	(1) Kingfisher Pension Trustee Limited (the <b>Trustee</b> ) (2) Kingfisher plc (the <b>Company</b> )

### Complaint summary

Mrs ■ has complained that:

- for early leavers the B & Q Guarantee has not been correctly interpreted or applied (the **Calculation Issue**);
- that the removal of the B & Q Guarantee for post-Kendall Date service was not valid (the **Amendment Issue**).

### Summary of the Ombudsman's determination and reasons

The complaint should not be upheld against the Respondents because the Guarantee has been correctly interpreted and was validly removed.

### Background information

Throughout this Determination I refer to arguments which Mrs ■ has made as she has been selected as the lead applicant. However, this Determination additionally consists of Mr ■ and Mr ■ comments as they have also made a complaint to my office regarding this same matter. It follows that this Determination is also binding on Mr ■ and Mr ■.

I also understand that, following the issue of my Preliminary Decision, comments have been sought from other potentially affected members of which I am told there are around 100.

## Detailed Determination

### Material facts

1. Mrs ■ commenced employment with B & Q Plc (B & Q) on ■.
2. Mrs ■ was employed as ■.
3. B & Q is a subsidiary of Kingfisher plc (Kingfisher).
4. Prior to 1988 Mrs ■ was a member of the B & Q (Retail) Limited Retirement Benefits Scheme (the **B & Q Scheme**). The B & Q Scheme was a final salary arrangement. The accrual rate for members depended on their age at joining. Normal retirement age was 60 for female members and 65 for male members. Pensionable salary under the B & Q Scheme was broadly annual basic pay.
5. With effect from 1 February 1988 (the **Merger Date**), the B & Q Scheme was merged into the Kingfisher Pension Scheme (**KPS**). KPS was a final salary arrangement with an existing membership.
6. KPS members who were transferred from the B & Q Scheme are referred to as B & Q Transferees.
7. Under KPS the accrual rate was 1/60<sup>th</sup> (regardless of age at joining). Normal retirement age for all members was 60. Pensionable pay was broadly basic pay over the last 12 months.
8. The B & Q Guarantee (the **Guarantee**) originated when the pension scheme was merged in 1988.
9. The Guarantee was effectively an underpin which stated that in specified circumstances and subject to specified conditions the benefits paid under KPS would not be less than the benefits which would have been paid under the B & Q Scheme.
10. The Guarantee was announced to members in the “New Pensions Arrangements” announcement of November 1987.
11. From 1 April 2004, KPS was divided into two sections, comprising the final salary arrangement (KPS-FS) and a new money purchase arrangement (KPS-MP). Some amendments were made to the terms of KPS-FS but it remained open to accrual and Mrs ■ remained an active member.
12. In July 2011, Kingfisher proposed to the Trustee amendments to the KPS (**Project Kendall**). These were that: KPS-FS would be closed to accrual with active members becoming entitled to early leaver benefits under the section (“freezing”) and joining KPS-MP for future service but the terms of KPS-MP would improve for all active members.

13. A 60 day consultation started on 2 February 2012, about the Project Kendall proposals.
14. Following the consultation Kingfisher made some modifications because of points raised by the Trustee and members. Kingfisher agreed that in respect of pre-freezing service, existing terms of KPS-FS as to early retirement would continue to apply.
15. KPS was amended by a deed of variation dated 29 June 2012 (the **Kendall Deed**). This was effective from 30 June 2012 (the **Kendall Date**).
16. The final salary section of the KPS closed to future accrual on 30 June 2012.
17. For post Kendall Date service Mrs ■ joined KPS-MP on the improved terms of that section. For pre Kendall Date service Mrs ■ was entitled to “early leaver” benefits under KPS-FS. Those benefits were calculated with reference to the Guarantee.
18. Mrs ■ has complained that the removal of the Guarantee for post-Kendal Date service was not valid (i.e. the **Amendment Issue**) and that for “early leavers” the Guarantee has not been correctly interpreted or applied (i.e. the **Calculation Issue**).
19. When referring to the 1985 booklet and 1986 booklet I refer to those B & Q booklets of said dates.

#### **Scheme Rules and other documentation**

20. The Guarantee was announced to members in the “New Pensions Arrangement” announcement of November 1987, which stated:

“For all existing employees who join the [KPS] on 1 February 1988, there is a guarantee that your benefits on retirement at the new retirement age will be at least as good as those which would then have been paid under the B & Q Scheme”.

21. The Guarantee was set out in the governing rules of KPS applicable to B & Q members – originally in rules adopted with effect from the Merger Date by a deed dated 31 March 1994.

The Guarantee states that (as set out in paragraph 3.1 of Schedule C to the trust deed and rules dated 20 August 2010):

“A [B & Q Transferee’s] pension at Normal Retirement Date (before commutation or surrender and whether an immediate pension on retirement at that date or a deferred pension coming into payment at that date after earlier leaving service) will be not less than the pension which would have been payable at that date under [the B & Q Scheme] if that scheme had continued unchanged and the member had remained a contributing member of it for so long as his Service continued and he had not opted out of FS Active Membership.”

22. Rule 4(a) of the B & Q Scheme states:

“A member who retires from Service at Normal Retirement Date shall be entitled to a pension of a proportion of his Final Scheme Salary for each year of Pensionable Service (up to a maximum of twenty years)..” This was calculated by reference to a scale.

23. Rule 13 of the B & Q Scheme (relating to early leavers) states:

“If a Member leaves Service, other than by retirement or death, he shall be entitled to a pension at Normal Retirement Date of an amount equal to the immediate pension to which he would be entitled if at the time of his leaving Service he were retiring from Service owing to Incapacity, provided that the Aggregate Pension shall not exceed one-sixtieth of Final Remuneration for each year of Service (with a maximum of 40 years) or such larger amount as will not prejudice Approval of the Scheme.”

24. Clause 10 of the Trust Deed (dated 20 August 2010) states:

“10 AMENDMENTS

#### 10.1 Trust Deed

Subject to sections 67 to 67I of the Pensions Act 1995, the Trustees will have the power with the written consent of the Company by deed to alter, modify or add to all or any of the trusts and provisions of the Trust Deed.

#### 10.2 Rules

Subject to sections 67 to 67I of the Pensions Act 1995, the Rules may be altered, amended, modified or added to by the Trustees in a deed but only with the written consent of the Company (which must not be given until the Company has consulted the Employer or Employers to whom they apply). However, for the avoidance of doubt, the Company will be under no obligation to consult an Employer who has ceased to participate in the Scheme.”

25. The 1985 booklet states (on page 8) that:

“Your pension will be a proportion of your Final Pensionable Salary for each year of service with the Company according to the undernoted table...”

The table references a calculation of 40/60ths of final pensionable salary for 20 or more years' service.

26. The 1985 booklet also states (on page 20) that:

“When you leave the company, you may not lose your right to a retirement pension. The precise position will depend on your “Qualifying Service” which means service with the company. If you are [sic] transferred any benefits from a previous scheme, that service will also count.”

27. The 1985 booklet states (on page 21) that:

“If you have Completed Five Years’ Qualifying Service

During the period of membership, you have earned a pension which is payable at your normal retirement age. The amount can be ascertained by referring to the Table used for calculating the normal retirement pension (see page 8). Part of this pension will represent your Guaranteed Minimum Pension and that part will be increased at 8.5 % p.a compound up to your normal retirement age. These increases will be paid in addition to your preserved pension.”

28. The 1985 booklet states (on page 24) that:

“In the event of any discrepancy between [the] booklet and the Trust Deed and Rules, the latter will prevail”.

29. The 1986 booklet stated (in the section on “Leaving the Company”) that an early leaver’s deferred pension would be:

“a proportion of the pension you would have received at normal retirement age as shown on the table on page 8; the proportion will relate to the service you could have completed had you not left...”

30. The 1985 booklet and the 1986 booklet had the same retirement provisions but they differed because the 1985 booklet did not explain that for early leavers their pension would be calculated on a proportionate basis.

### **Summary of Mrs [REDACTED] position**

#### The Calculation Issue

31. That the Trustee failed to honour her entitlement to receive two thirds of her final salary pension at the normal retirement age as per the express contractual terms of the Scheme offered to her and as detailed in the B & Q pension booklet which she was provided with on joining the Scheme in 1985.
32. The 1986 booklet did not apply to her, it only applied to new members from that date and was not backdated to existing pension scheme members. No communication was sent to existing pension scheme members saying that the 1986 booklet now

applied. Although Ms ■ was aware of the 1986 booklet, she did not think that it applied to her.

33. As stated by the Trustee during the consultation period, the Company has “an obligation to pay a pension that an employee has legally earned, and the definition of this depends on what the employee was told and not at the point of grant of the pension and the issue is around what did the Company promise.”
34. Mrs ■ had a reasonable and continued expectation regarding her entitlement to receive two thirds of her final salary pension. The case of IBM United Kingdom Holdings Ltd and another v Dalglish and others [2015] supports this.

#### The Amendment Issue

35. There is no power even with the consent of the Trustee for the terms of the Scheme to be amended or retrospectively changed particularly for those with pensionable service prior to October 1986.
36. That it has been confirmed by the Trustee and their Legal Advisor that:

“The law doesn’t allow the new deeds to take away or reduce any previous service accrual and that legislation does protect already accrued and in payment benefits, therefore adverse changes could not be made to these even if the Company and the Trustee wanted to do so.”
37. Elements of the consultation undertaken by Kingfisher Plc and the implementation of their decisions have been defective and flawed, including the fact that the Company failed to fully explain the “consequences” of the final salary scheme.
38. The Company should have carried out a separate consultation for the B & Q Guarantee employees.
39. A pension’s update, “talking pension”, which was issued in November 2011 stated that there was no intention to close the scheme.
40. That the B & Q Guarantee continues to operate by reference to Mrs ■ current pay and service because she remains in service and it is immaterial that the Kendal Deed deemed active members to have left service.
41. If it was within the scope of the amendment power to remove the Guarantee for the future its value was severely limited since it could have been removed in 1988 immediately after it was given. The amendment power should be interpreted as being subject to the terms of the B & Q Guarantee.
42. Mrs ■ had a reasonable expectation that that her entitlement was that which she was advised as a new starter and that which formed part of her terms and conditions of employment.

43. Previous B & Q Guarantee employees have received their 2/3 full pension in line with the terms of the 1985 booklet on completion of 20 plus years in service but not 40 years in service.
44. Mrs ■ was continuously led to believe that the terms of the 1985 booklet would remain intact and protected and that she would be “no worse off”. If she had known the position in 1986 then she would have made provision for paying an increased AVC contribution.
45. Although Mrs ■ received annual pension statements she was informed by a previous head of group pensions that this was “standard practice” and nothing to worry about as she had the original terms and conditions to rely upon and regular communications with Kingfisher to confirm this arrangement. Kingfisher did not want to “make this overt” as the Guarantee was only available to a small remaining proportion of B & Q employees and it was felt this should be kept low key.

### **Summary of Kingfisher Pension Trustee Limited and Kingfisher plc’s position**

#### The Calculation Issue

46. The 1985 booklet was misleading. However, this was quickly corrected by the issue of the 1986 booklet.
47. The annual benefits statements which were sent to Mrs ■ demonstrated that her “early leaver” pension was not a full 2/3rds pension even though she had over 20 years pensionable service.
48. Mrs ■ rights are not determined by the booklets but by the governing documents of KPS and the B & Q Scheme. Those documents make it clear that “early leaver benefits” are calculated on a proportionate basis.

#### The terms of the B & Q Guarantee

49. The B & Q Guarantee was an underpin which was introduced under KPS for B & Q transferees, recognising that the standard KPS benefit was different from the B & Q benefit scale. The B & Q Guarantee was described, in the “New Pension Arrangements” announcement issued to the transferring B & Q Scheme members in November 1987 as:

“For all existing employees who join on 1 February 1988, there is a guarantee that your benefits on retirement at the new retirement age will be at least as good as those which would then have been paid under the B & Q Scheme.”
50. The B & Q Guarantee was set out in the governing rules of the KPS applicable to B & Q members – originally in rules adopted with effect from the Merger Date by deed dated 31 March 1994. The terms of the B & Q Guarantee remained in all applicable

aspects unchanged until immediately prior to the Kendall Date, at which point the Guarantee was set out in the trust deed and rules dated 20 August 2010.

“A [B & Q Transferee’s] pension at Normal Retirement Date (before commutation or surrender and whether an immediate pension on retirement at that date or a deferred pension coming into payment at that date after earlier leaving service) will be not less than the pension which would have been payable at that date under [the B & Q Scheme] if that Scheme had continued unchanged and the member had remained a contributing member of it for so long as his Service continued and he had not opted out of FS Active Membership.”

#### Benefits payable under the B & Q Scheme

51. The pension which would have been payable must be determined by reference to B & Q’s Scheme governing documentation. The relevant documentation is the B & Q Scheme Rules – dated 18 July 1975.
52. That rule 4(a) provides that where a member retired from service at normal retirement age, the pension payable would be a specified proportion of pensionable salary, dependent on completed pensionable service.
53. The pension payable on early retirement or early leaving (rule 13) was calculated on a proportionate basis. The pension which would have been payable if the member had reached normal retirement age was scaled down using the formula  $N/NS$ , where “N” was pensionable service actually completed and “NS” was pensionable service which would have been completed by normal retirement age.

#### The Amendment Issue

54. Clause 10 of the trust deed (dated 20 August 2010) conferred powers to amend both the trust deed and the rules of KPS. Both powers were exercisable by the Trustee subject to Kingfishers consent. There were no fetters or restrictions on either power, except the requirement to comply with s 67 Pensions Act 1995 (the statutory safeguard for accrued rights).
55. On the face of it the Kendall Deed validly removed the B & Q Guarantee for post Kendall date service.
56. The amendments made by the Kendall Deed did not adversely affect members’ accrued rights and the B & Q Guarantee was taken into account when calculating “early leaver” benefits such as Mrs [REDACTED].
57. The courts would be slow to imply a restriction to the trustees’ power to amend a pension scheme. Implying such a restriction would cut across two firmly established positions of trust law: firstly that trustees should not fetter their discretion and



secondly that the fullest possible effect should be given to the amendment provisions so as to ensure that schemes can adapt and evolve over time.

58. The argument that it is necessary to imply an ad hoc term into the KPS amendment power, preventing the removal of the B & Q Guarantee is not correct. It is flawed because:

- The B & Q Guarantee was not “sold” to B & Q Transferees as having a particular value and the announcement was noticeably low key.
- The B & Q Guarantee had immediate value for B & Q Transferees as the broad position was that benefits under KPS for pre-Merger Date pensionable service would be at least equal to those which would have been provided under the B & Q Scheme.
- Under the express terms of the KPS amendment power, removal of the B & Q Guarantee would have required the consent of the Trustee; and the Trustee has a fiduciary duty towards members.
- It is inconceivable that the B & Q Guarantee could or would have been validly removed immediately after it was given unless some unanticipated new factor, sufficient for the Trustee to consent to removal, had arisen.

59. The pension’s update which was issued a few months before the consultation was the November 2011 edition of the Scheme’s annual newsletter “talking pension”. This included a summary funding statement. This included information about the Scheme’s buy-out deficit and included a statement about intentions. The statement referred to the winding up of the KPS and not about the continuation of accrual under the final salary section.

60. The reasonable expectations of the B & Q transferees were already protected by the express terms of the KPS amendment power, the Trustee’s fiduciary duty and by the duties of Kingfisher/B & Q which were implied by law. Therefore, it was not necessary to imply an ad hoc term to prevent the removal of the B & Q Guarantee.

61. If an ad hoc term were implied then the result would be that the underpin benefit for B & Q Transferees would be entrenched, but with Kingfisher and the Trustee apparently free to remove the 1/60<sup>ths</sup> benefit which it underpinned. This cannot have been the intention of the parties.

62. Instead the B & Q Guarantee was removed more than 24 years after it was given. When it was removed it was consistent with the KPS amendment power, after consultation with members and with the Trustee’s fiduciary duty.

63. There is no legal basis for implying any restriction to the amendment power.

## Conclusions

### The time limit point

64. I have considered the question of time limits and my jurisdiction to consider this complaint under Regulation 5 of The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (the **1996 Regulations**).
65. I am satisfied that the Calculation Issue and the Amendment Issue are interwoven and essentially form part of the same complaint. In order to fully explore the Amendment Issue it is necessary to look at the Calculation Issue.
66. In short, Mrs ■ complains that she was entitled to a certain level of benefits (the Calculation Issue) and that these were wrongly taken away when the Guarantee was removed (the Amendment Issue).
67. As Mrs ■ complaint arose as a result of the removal of the Guarantee, I am satisfied that it was reasonable that Mrs ■ brought her complaint within three years of its removal and that consequently this complaint falls within my jurisdiction under 5 (2) or alternatively 5 (3) of the 1996 Regulations.

### The Calculation Issue

68. Mrs ■ refers to “express contractual terms” of the Scheme offered to her “and as detailed in the B & Q pension booklet which she was provided with on joining the Scheme in 1985”.
69. Mrs ■ has made the argument that the promises made in the 1985 scheme booklet should bind the trustees. However, it is quite clear that under the rules Mrs ■ is not entitled to this – rule 13 provided that “early leaver” benefits were to be calculated on a proportionate basis.
70. Mrs ■ is only entitled to receive the benefits that the rules of the Scheme provide. I do accept that there is some weight in Mrs ■ argument that she relied on the booklets produced for information on her entitlement.
71. However, if there is a conflict between a pension scheme's explanatory booklet and its definitive trust deed and rules, the deed and rules will prevail. I say this because it is well established at law that explanatory material provided to members of an occupational pension scheme, will not generally override the formal provisions of the scheme's trust deed and rules. This issue was considered in *Steria Ltd & Ors v Hutchison & Ors* [2006] EWCA Civ 1551. In any event, when the new booklet came out in 1986 it reflected what was provided for in the trust deed and rules.
72. Indeed, the 1985 booklet makes it clear that “in the event of any discrepancy between [the] booklet and the Trust Deed and Rules, the latter will prevail” (page 24). It also states that “the company must reserve the right to terminate or amend the scheme at

any time” (page 24). It is unambiguous that the 1985 booklet was intended to be read in conjunction with the Scheme’s governing trust deeds and rules. Furthermore, the use of the disclaimer in the 1985 booklet made it clear that in the event of any disparity the deed will prevail. There was nothing in the 1985 booklet, when taken as a whole, to suggest that the trustees could not alter the level of benefits in the future.

73. It follows that I am satisfied that the 1985 booklet did not confer any express legal rights over those provided for in the Scheme’s trust deed and rules. I must now go on to consider whether it could be said that Mrs ■ has an enforceable contractual right to the higher level of benefits.
74. No employment contract which establishes a contractual right to continued future accrual of defined benefit pensions has been provided. Kingfisher has stated that they do not have such a document and none has been provided by Mrs ■. Kingfisher has stated that the employment contracts which they reviewed simply refer to the employee being able to join the Scheme “subject to the terms and rules of the Scheme from time to time”. Therefore, I cannot conclude that Mrs ■ has a contractual right (established through her employment contract) to the higher level of benefit.
75. In reality, Mrs ■ argument seems more akin to one of estoppel rather than an issue of construction. In the absence of a contract being formed outside of the scheme rules, Mrs ■ will only be entitled to the higher level of benefits provided if she has an estoppel argument or a change of position defence. The courts have examined the difficulties of establishing an estoppel in the context of a claim to particular pension benefits on numerous occasions. Recent cases have included Redrow Plc v Pedley & Anor [2002] EWHC 983 (Ch) and Hearn v Younger [2005] PLR 49.
76. In the case of Steria Ltd & Ors v Hutchison & Ors [2006] EWCA Civ 1551 (from which analogy can be drawn with this complaint), the 1991 booklet (which Mr Hutchison sought to rely upon) contained clear wording that the trust deed prevailed over it. This prevented Mr Hutchison from being able to establish that he relied on the 1991 booklet and the 1994 letter without referring to the trust deed. Given the disclaimer, Lord Mummery held that there could be no operative reliance on statements inconsistent with the trust deed in order to establish an estoppel. The Court of Appeal accepted that the disclaimer would be effective, provided the disclaimer statement was clearly expressed and clearly located in the booklet (not tucked away in small print). In consequence, representations contained in booklets that use disclaimer statements cannot be regarded as unambiguous, and, as such, are unlikely to be capable of forming a basis of an estoppel defence.

77. It follows that, based on the above reasoning, I cannot conclude that the misleading information in the 1985 scheme booklet has given rise to a situation in which it would be unconscionable for the mis-leading information not to be complied with. This is because it was clear that the booklet was intended to be read with the Scheme rules and the disclaimer was unambiguous. Rule 13 has always said the same thing – that “early leaver” benefits would be calculated on the proportionate basis. This would prevail.
78. I have also noted that the 1986 booklet stated (in the section on “Leaving the Company”) that an early leaver’s deferred pension would be:
- “a proportion of the pension you would have received at normal retirement age as shown on the table on page 8; the proportion will relate to the service you could have completed had you not left”.
79. Even if the 1985 booklet was mis-leading, I agree with the Company and the Trustee that the 1986 booklet made the position clear. That is, that Mrs [REDACTED] pension would be calculated on the proportionate basis – and that is what it says under the Scheme rules (which in any event are, as I have set out above, overriding).
80. I have noted Mrs [REDACTED] comments that she relied on statements which were made to her in relation to the Guarantee which suggested that she would get a full 2/3rds pension and that she could ignore the other information which she received. On this basis Mrs [REDACTED] has said that she had a reasonable and continued expectation regarding her entitlement to receive two thirds of her final salary pension and refers to the case of IBM United Kingdom Holdings Ltd and another v Dalglish and others [2015] in support of this.
81. However, I am not satisfied that the head of pensions would say that the issuing of statements specific to Mrs [REDACTED] was standard practice and that Mrs [REDACTED] could ignore these. Nor am I satisfied that Mrs [REDACTED] could have held a reasonable belief that this was the case, especially given Mrs [REDACTED] various positions within the Company, initially being employed as [REDACTED] and later as [REDACTED].
82. I have also noted that Mrs [REDACTED] received annual benefit statements in which her “early leaver” pension benefits were correctly calculated and are shown as being significantly less than the 2/3rds pension to which she says she was entitled. On balance I cannot conclude that the 1985 booklet, or statements which Mrs [REDACTED] says were made to her, gave Mrs [REDACTED] reasonable grounds to rely upon them in light of the other information which she received to the contrary, which was consistent with the 1986 booklet and the terms of the B & Q Rules and the Guarantee. There was nothing in the Guarantee which suggested that the terms of the 1985 booklet were correct.

83. Mrs ■ has said that she did not think that the 1986 booklet applied to her. However, the benefit statements which were issued to her reflected the 1986 booklet. The statements and 1986 booklet in turn reflect the terms of the Guarantee. The 1985 booklet does not. The 1985 booklet is in any event ambiguous as it does not say what the position actually is in relation to early leavers.
84. A “talking shop” article dated December 1987 has been provided, however I do not find that this assists Mrs ■ in establishing that she had a reasonable expectation to a higher level of benefit. This article refers to a “new pensions guide” and was issued consequent to the 1986 booklet which, again, correctly reflected the benefits to which she was entitled.
85. It follows that I do not accept Mrs ■ recent argument that if she had known of the position in 1986 then she would have made provision for paying an increased AVC contribution because, on balance, I do not accept that it was reasonable for Mrs ■ to rely on the 1985 booklet in isolation.
86. In any event, Mrs ■ understanding that she would be entitled to a 2/3rds pension upon retirement and her statement that other B & Q Guarantee employees received a full 2/3rds pension upon retirement, as well as the evidence which she has provided in respect of what she was told, was not incorrect. So, for the reasons which follow, I do not think that she would have done anything differently.
87. Mrs ■ has stated that the respondents did not want to make the Guarantee overt. However, I do not think that this assists Mrs ■ argument as under the Rules of the B & Q Scheme those who were not early leavers and retired from pensionable service at normal pensionable age with 20 plus years of service were entitled to a full 2/3rds pension (rule 4(a)).
88. Under the Rules of the B & Q Scheme, members who left pensionable service before normal retirement age (early leavers) were not entitled to a full 2/3rds pension, even if they had 20 plus years pensionable service (rule 4(b) and rule 13) but those who retired from pensionable service at normal pensionable age with 20 plus years of service were entitled to a full 2/3rds pension (rule 4(a)).
89. When the amendment power was exercised Mrs ■ became an “early leaver”. As an “early leaver”, the pension which would have been payable to Mrs ■ if she had of reached normal retirement age was scaled down using the formula  $N/NS$ , where “N” was pensionable service actually completed and “NS” was pensionable service which would have been completed by normal retirement age. This was reflected in the annual benefit statements which she received and in the 1986 booklet, which in turn reflected the terms of the B & Q Rules and therefore the Guarantee.
90. I have therefore gone on to consider below whether the amendment power was properly exercised.

The Amendment Issue

91. The question of whether the parties have the necessary powers will be determined primarily by the scheme's trust deed and rules. There has been a suggestion by Mrs ■ that there may be other relevant deeds which have been withheld; however I find no evidence of that.

92. Clause 10 of the Trust Deed (dated 20 August 2010) states:

“10.1 Trust Deed

Subject to sections 67 to 67I of the Pensions Act 1995, the Trustees will have the power with the written consent of the Company by deed to alter, modify or add to all or any of the trusts and provisions of the Trust Deed.

10.2 Rules

Subject to sections 67 to 67I of the Pensions Act 1995, the Rules may be altered, amended, modified or added to by the Trustees in a deed but only with the written consent of the Company (which must not be given until the Company has consulted the Employer or Employers to whom they apply). However, for the avoidance of doubt, the Company will be under no obligation to consult an Employer who has ceased to participate in the Scheme.”

93. Therefore, Clause 10 conferred powers to amend both the trust deed and the rules of KPS. Both powers were exercisable by the Trustee - subject to Kingfisher's consent. The governing documentation does not impose restrictions on the power of amendment which the proposed alteration would infringe. The only requirement was to comply with s 67 Pensions Act 1995 to 67I of the Pensions Act 1995 (the statutory safeguard for accrued rights).

94. When it is clear that there is a power in the scheme rules to make the required modification (as in Mrs ■ case), the trustees and the employer should then determine whether or not the subsisting rights provisions apply to their scheme and if they do, the trustees must check whether the proposed modification is a regulated modification within the meaning of the legislation (a regulated modification being a modification which is a protected modification or a detrimental modification or both).

95. Therefore, in Mrs ■ case, the closure of the Scheme to future accrual would be subject to the statutory restrictions in Section 67 of the Pensions Act 1995. Section 67 of the Pensions Act 1995 restricts benefit changes which might adversely affect members' subsisting rights – that is, “any right which at that time has accrued to or in respect of [the member] to future benefits under the scheme rules; or any entitlement to the present payment of a pension or other benefit which [the member] has at that time, under the scheme rules”.

96. Section 67A of the Pensions Act 1995 states that a change is a “protected modification” where money purchase benefits would replace non-money purchase benefits, or where the change would result in a reduction to a pension in payment. “Detrimental modifications” are amendments that would or might adversely affect any subsisting right of a member or survivor.
97. Based on the facts of this case, I am satisfied that the changes did not constitute a regulated modification. Because, by freezing Mrs [REDACTED] existing benefits they were not replaced with money purchase benefits nor were her subsisting rights adversely affected. I am therefore unable to conclude that the amendments infringed the relevant restrictions.
98. If the proposed modification is not a regulated modification and there is power to make the modification in the rules, and making the modification would be a proper use of that power, then the trustees or the employer, or both, whoever can validly exercise that power, may make the modification.
99. Under section 67A (7) the subsisting rights of an active member in pensionable service are determined as if they had opted to terminate service immediately before the amendment i.e. as if they had become a deferred member. Therefore, the effect of the closure of the Scheme to future accrual was to make all active members deferred – as happened to Mrs [REDACTED]. Mrs [REDACTED] benefits which had already been earned under existing arrangements were not worsened. This is consistent with the requirements of Section 67.
100. In *Stena v MNRPF* [2011] EWCA Civ 543 the Court of Appeal stated that “the starting point in relation to powers to amend pension schemes is that they should be given a broad interpretation”. The court declined to imply restrictions to amendment powers and emphasised the importance of not fettering these. In Mrs [REDACTED] case, it was clearly within the scope of the amendment power to make the alterations.
101. It is not sufficient, however, for the employers and the trustees simply to have the necessary powers to carry out the amendment; they must ensure that in exercising those powers they act in a manner consistent with their duties as employers and trustees respectively. The employer must not, without reasonable and proper cause, act in a way “calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee” (*Re Imperial Tobacco* [1991] 1 WLR 589).
102. Applying these principles to the facts of Mrs [REDACTED] case, it is clear that she was given due warning of the impending changes because on 2 February 2012, the respondents began a 60 day consultation with employees about the proposals (in line with the requirements set out in the Consultation Regulations/s259 – 261 Pensions Act 2004). Following the consultation, modifications were made following points raised by active members. Mrs [REDACTED] has said that the respondents ignored feedback,

particularly from members of the B & Q Guarantee. Members' expectations were relevant to this test, but the respondents were also entitled to take their own interests and the future operation of the Scheme into account. On the facts, the decision which they consequently took does not appear to have been irrational or perverse. I have also noted the respondent's comments that complaints about the consultation process were made to the Pensions Regulator who investigated these and concluded that there was no case to answer.

103. Following the decision in the case of *Nicol & Andrew Ltd v Brinkley* [1996] OPLR 361, if offer, acceptance and consideration can be established, then it could be argued that Mrs ■ would have an enforceable right to the higher level of benefit which she otherwise would not have (by virtue of the Guarantee). In Mrs ■ case there was no such offer and acceptance. The respondents have made the argument that Mrs ■ did not need to consent to the transfer and I am persuaded by this argument because Mrs ■ benefits were transferred as part of the merger of the two schemes. I am not persuaded by Mrs ■ argument that the Guarantee continues to operate by reference to her current pay and service because the closure deeds make clear that a B & Q Guarantee member will be deemed to have left service for the purpose of the B & Q Scheme on 30 June 2012. The Company did honour the Guarantee until such a date as the Scheme closed to future accrual.
104. There still remains the question of Mrs ■ legitimate expectation in relation to the Guarantee. It can be said that Mrs ■ did have a legitimate expectation that the Guarantee would not be unpredictably removed. However, once the Scheme was closed to future accrual I cannot conclude that Mrs ■ had a reasonable expectation that benefit accrual would continue into the future given the Scheme restructuring. There was no suggestion that the Guarantee could never have been amended at a future date and the Guarantee was taken into account when calculating Mrs ■ "early leaver" benefits for pre Kendall Date service – it was only after the closure of the Scheme to future accrual that the Guarantee fell away.
105. For the reasons set out above I do not uphold Mrs ■, Mr ■ or Mr ■ complaints.

**Anthony Arter**

Pensions Ombudsman  
22 March 2016