

Ombudsman's Determination

Applicant	Ms Y
Scheme	Sotheby's Pension Scheme (the Scheme)
Respondent	Trustees of the Sotheby's Pension Scheme (the Trustees)

Outcome

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

Complaint summary

2. Ms Y's complaint relates to the part of her pension accrued prior to 6 April 1997 which is in excess of her guaranteed minimum pension (**the Pre 97 Excess Pension**). She is unhappy that the Trustees failed to inform her that the power to grant inflation linked increases was, in her view, no longer vested solely in them.
3. She also complained that she was not made aware that increases on this element of pension that were explained to her over a period of 25 years of employment were not guaranteed by the various iterations of the Trust Deed and Rules that had governed the Scheme (**the TD&R**).
4. Ms Y wants her pension from the Scheme to be increased in line with inflation and for these increases to be backdated.

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

5. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
6. The Pensions Act 1995 (**the 1995 Act**) is relevant to this case and an extract from it can be found in Appendix 1. Extracts from the final and previous versions of the TD&R and Scheme booklet (**the Booklet**) can be found in Appendices 2 and 3 respectively.
7. In 1974, Ms Y commenced her employment with Sotheby's (**the Employer**) and she joined the Scheme on 1 January 1976.

8. On 6 May 1987, the Chair of the Trustees sent Ms Y a letter which stated:

“In accordance with the powers vested in the trustees, discretionary increases can be paid to existing pensioners and accordingly pensions in payment were increased by 6% with effect from 1st March 1987.”
9. On 4 May 1988, a similar letter was sent stating that:

“In accordance with the powers vested in the trustees, pensions in payment were increased by 6% per annum with effect from 1st March 1988.”
10. On 30 November 1998, Ms Y was made redundant, and she became entitled to deferred benefits in the Scheme. She was sent a leaving statement by the Scheme’s administrators (**the Leaving Statement**) which stated that: “Additional increases may be payable, at the discretion of the Trustees and the Company.”
11. In October 2013, Ms Y reached her normal retirement date, and her retirement benefits were paid from the Scheme.
12. In August 2014, the Trustees sent Ms Y an ‘Important Message about Discretionary Increases’. This said that the Employer had changed its policy on discretionary increases to pensions in payment. The Employer had advised that, in future, such increases would only be granted in exceptional circumstances.
13. On 3 July 2018, the Trustees purchased a bulk annuity policy in respect of the Scheme’s pensioner liabilities from Just Retirement Limited (**Just**). Pension increases on Pre 97 Excess Pensions were not included in the policy as of right (i.e. they were not guaranteed to be paid in the future).
14. On 11 December 2020, the Trustees wrote to Ms Y to notify that, over the next 18 to 24 months, a process of transition would result in her becoming a holder of an insurance policy in her own name, paying her pension. A ‘Questions and answers’ (**Q&A**) document was included.
15. On 1 January 2022, the Employer triggered the wind-up of the Scheme. It said that there would be no further discretionary increases applied to pensions in payment.
16. On 9 January 2022, Ms Y raised a complaint with the Trustees. In summary, she said:-
 - The Trustees had failed to notify Scheme members of how the Scheme worked. This had resulted in members, including herself, making financial decisions without being in possession of all the relevant information. In particular, the Trustees knew that the belief in an inflation proofed pension was common among members. The benefits of protection against inflation had been used to help justify low salaries by the Employer, when compared to colleagues in the United States.
 - It should not have taken as long as it did for her to learn, in 2014, that the TD&R were silent on the matter of guaranteed increases on her Pre 97 Excess Pension.

Nor was she notified when the Trustees relinquished control of any discretionary increases to the Employer.

- Furthermore, the Trustees did not ensure that the TD&R were robust against an aggressive employer or alert her to weaknesses until she received a letter in 2014 relating to pension increases. It was also never mentioned to her that the TD&R could change, so she continued to believe what she had been told decades earlier.
- A significant proportion of communications from the Trustees had misled her. For example, in December 2020, the Trustees said they were “delighted”. This left her thinking it was good news rather than understanding that, on the closure of the Scheme, only the pension increases required by legislation would be provided.

17. On 9 March 2022, the Trustees provided their response to Ms Y’s complaint, which they had considered under the Scheme’s two-stage internal dispute resolution procedure (**IDRP**). They advised that her complaint had been escalated to stage two of the IDRP, given the upcoming wind-up of the Scheme. In summary, they said:-

- No increases on her Pre 97 Excess Pension were required by pensions legislation. The TD&R had always provided for increases on this element of her pension to be discretionary. The TD&R never allowed the Trustees to pay an increase to her Pre 97 Excess Pension without the consent of the Employer.
- The discretionary increases rule first appeared in the 1994 TD&R. Prior to that, discretionary increases, when granted, were granted under the augmentation and/or special contributions provisions contained in earlier TD&R. All of these required the Employer to agree to any discretionary increase. So, it was incorrect to say that the Trustees relinquished control over discretionary increases to the Employer.
- The Trustees never made any promises that increases on Pre 97 Excess Pensions would be paid. Such increases were described as discretionary in the Booklet.
- There had been no change to the TD&R in relation to the discretionary nature of the increases and hence there had been no need to notify Scheme members of a change. The Trustees did not need to notify members of the precise wording in the TD&R, in relation to discretionary increases, beyond the wording in the Booklet stating that they were discretionary and not guaranteed.

18. On 16 June 2022, Ms Y responded to the Trustees. In summary, she said:-

- She considered that she had a right to non-guaranteed increases but, with the closure of the Scheme, she had lost this.
- All the correspondence she received stated that the power to grant increases on her Pre 97 Excess Pension was vested in the Trustees. If it was the case that the

Employer always had the right to veto such increases then, after 1996, the Trustees would not have been abiding by the Occupational Pension Schemes (Disclosure of Information) Regulations 1996 (**the Disclosure Regulations**). Schedule 1, Paragraph 13 of which requires members to be informed:

“whether there is a power under the scheme rules to increase pensions after they have become payable, otherwise than in accordance with statutory requirements, and if so what it is, who may exercise it, and whether and to what extent it is discretionary.”

- Increases on her Pre 97 Excess Pension were not always described as ‘discretionary’. In the 1979 and 1988 Booklets, and in her Leaving Statement, they were described as ‘guaranteed’ or ‘not guaranteed’. The Trustees were duty bound to make clear the meaning of the words they used, and no glossary of terms was provided. ‘Not guaranteed’ and ‘discretionary’ were not interchangeable.
- The Trustees had misread the Leaving Statement. The reference to the possibility of additional increases being payable was in the light of the Scheme being in surplus at the time. Contribution holidays were being taken by the members and the Employer and pensioners were being paid bonuses over and above any annual non-guaranteed pension increases. It was these bonuses that were being referred to.
- The 1988 Booklet stated that:

“Increases on the rest of your pension are not guaranteed but the Scheme has an excellent track record. Between 1974 and 1988 for instance, increases on all the pension were made each year ...”.

19. On 24 June 2022, an annuity policy with Just was assigned directly to Ms Y, securing the benefits to which she was legally entitled in the Scheme.

20. On 2 August 2022, the Trustees responded to Ms Y’s communication of 16 June 2022. In summary, they said:-

- Ms Y always had the right to see the TD&R on request. Her benefits had also been summarised in Booklets, including the editions of 1978, June 1979 and 1988. She had also received a statement of benefits on leaving pensionable service and, when nearing retirement, an illustration of her retirement benefits.
- Ms Y said that all the correspondence she had received stated that the power to grant discretionary increases was vested in the Trustees; also that the Trustees did not satisfy the Disclosure Regulations. However, the Leaving Statement she received stated: “Additional increases may be payable, at the discretion of the Trustees and the Company.” They did not agree with the construction she put on this statement in her letter of 16 June 2022.

21. Following the complaint being referred to The Pensions Ombudsman, Ms Y and the Trustees made further submissions.
22. Ms Y made the following additional submissions:-
 - The Trustees' letters of 6 May 1987 and 4 May 1988 stated that power was vested in the Trustees to grant pension increases. She had never received any formal statement confirming that the Employer's consent was also required.
 - The August 2014 letter from the Trustees said that she should consider discretionary increases as a thing of the past. The letter suggested that the Employer was the sole arbiter in relation to pension increases. This was something that had not been made clear to her before she took her benefits. She had understood the Scheme to have been totally independent of the Employer and its finances.
 - She had received the Q&A document which was included with a letter from the Trustees in December 2020. In relation to her benefits being secured with Just, it was stated that: "the Trustees will have fulfilled their duty to protect your benefits and ensure you receive them in full ... but no additional or discretionary benefits will be payable." The use of the word 'full' seemed to have been intentionally misleading.
 - The Trustees never stated that key information in the Guides and correspondence she had received was not reflected in the TD&R. If the Scheme always worked as the Trustees were now saying, even members of the Employer's Personnel Department, who ran the Scheme for the first 30 years, were ignorant of its workings.
 - In 1987/88, when membership became voluntary, she was encouraged to remain in the Scheme. However, she did not know that the TD&R at that time did not refer to pension increases. The 1988 Booklet included an example of a pension increasing from £5,000 to £7,000 over 10 years. There was no caveat that the increases depended on the Employer's goodwill.
 - In 1997, she was not informed about the introduction of statutory increases on pension accrued after 5 April 1997 in excess of any Guaranteed Minimum Pension. Nor why the Trustees did not include a 'scheme rate' of inflation in the TD&R to ensure parity of increases for all members. If they did not consider this, then it was a dereliction of their duty.
 - While the Trustees said that, prior to 1994, discretionary pension increases would have been granted under the augmentation and/or special contributions provisions, these provisions had not been quoted.
23. The Trustees additionally submitted that Ms Y had not provided evidence that she was legally entitled to be paid discretionary increases. In particular, no assurances had been provided by the Trustees that such increases would be paid indefinitely.

Adjudicator's Opinion

24. Ms Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustees. The Adjudicator's findings are summarised in paragraphs 25 to 41 below.
25. The Adjudicator said that pensions legislation and the TD&R govern the benefits that the Trustees are required to pay from the Scheme. The final version of the TD&R was that dated 30 March 2004, an extract from which can be found in Appendix 2. Paragraph B22.2 refers to the Scheme providing pension increases to comply with sections 51 and 54 of the 1995 Act. Paragraph B22.1 refers to further increases that may be applied. It is stated that the consent of the Employer is required to pay these further increases.
26. Looking at Sections 51 and 54 of the 1995 Act (see Appendix 1), these make it clear that certain elements of pension are required to increase under legislation. However, this does not include the Pre 97 Excess Pension. So, the Adjudicator's view was that any increases that were applied to this element of Ms Y's pension in the past were not statutory increases; they were further increases as referred to in paragraph B22.1. As such, under this version of the TD&R, they were subject to the consent of the Employer.
27. The Adjudicator reviewed all previous versions of the TD&R to ascertain whether, at any stage, the increases on Pre 97 Excess Pensions were guaranteed and, if not, what consent was required to make such increases:-
 - The TD&R dated 9 December 1994 did not include any provision for guaranteed pension increases to Pre 97 Excess Pensions. It states that: "any pension ... may with the consent of the Principal Employer from time to time be increased ...". So, again, in the Adjudicator's view, any increase on the Pre 97 Excess Pension would have been subject to the Employer's consent.
 - The TD&R dated 22 April 1982 contain no specific provisions in relation to pension increases, either guaranteed or not. At the time, pension increases were granted under the Scheme's special contribution provisions. Reference is made to the provision of benefits by payment of special contributions into the Scheme by the Employer and it instructing the Trustees concerning the provision of benefits as a result of the payments. So, in the Adjudicator's view, any pension increases granted to Pre 97 Excess Pensions would have required the Employer's consent.
 - The TD&R dated 27 February 1974 also contain no specific provisions in relation to pension increases. At the time, pension increases were granted under the Scheme's augmentation provisions. These refer to the payment of a sum by the Employer to the Trustees to augment benefits for members. As a pension increase could only be granted if the Employer consented to making an additional payment to the Scheme, the Adjudicator's view was that it controlled the provision of pension increases.

28. Considering this analysis, the Adjudicator's view was that increases on Pre 97 Excess Pensions had never been guaranteed and, where they had been granted, the Employer's consent was always required. So, the Adjudicator's opinion was that the part of Ms Y's complaint relating to the power to grant such increases being no longer solely vested in the Trustees could not be upheld. His view was that the Trustees had never solely held this power.
29. The Adjudicator noted that the Trustees had acknowledged that the communications sent to Ms Y did not always correctly reflect who had the ability to increase her Pre 97 Excess Pension. For example, letters sent to Ms Y in May 1987 and May 1988 referred to discretionary increases being granted: "in accordance with the powers vested in the trustees".
30. Furthermore, the Booklets issued in March 1978 and May 1988 referred to the Trustees reviewing pensions. This was amended in the Booklet issued in April 1994 which referred to a review by: "the Trustees and the Company".
31. The March 1978 and May 1988 Booklets included additional wording to highlight that they were considered only as guides and that the TD&R were the formal documents that governed the Scheme. It was also confirmed that the TD&R were available to view on request.
32. When Ms Y was made redundant on 30 November 1998, the Leaving Statement that she was sent stated that: "Additional increases may be payable, at the discretion of the Trustees and the Company." So, in the Adjudicator's view, she would have been aware from this point in time that the Employer was likely to be involved in the pension increase process. Had she had any concerns at the time that there was an inconsistency with previous information she had been given, then she had the opportunity to query this with the Employer or ask to view a copy of the TD&R. The Adjudicator had seen no evidence to suggest that she did this at the time.
33. Ms Y claimed that the Leaving Statement was referring to a different kind of pension increase, payable as a bonus due to the Scheme being in surplus at the time. However, the Adjudicator's opinion was that this was not the case. His view was that, with the exception of any statutory pension increases that members of the Scheme were entitled to, all increases were paid under the same provisions of the TD&R, for whatever reason the Employer and Trustees decided to grant them. So, the information that the Employer was involved in the decision-making process applied, in his view, to all non-statutory increases.
34. Ms Y also said that she was not made aware that the historical increases she had received were not guaranteed by the TD&R. However, she would have been aware from communications from the Chair of the Trustees in May 1987 and May 1988 that discretion was required to pay some pension increases. This point was also communicated to Ms Y in the Leaving Statement which she received in November 1998.

35. The Adjudicator had seen no evidence of any communications being sent to Ms Y that stated that the increases on her Pre 97 Excess Pension were guaranteed. Ms Y had referred to the 1988 Booklet which highlighted the “excellent track record” of past pension increases. However, the Adjudicator’s view was that, as the discretion of the Employer and the Trustees was required to pay increases on Ms Y’s Pre 97 Excess Pension, there was no guarantee that such increases would be paid at similar rates in the future.
36. Ms Y referred to the Trustees knowing that the belief in an inflation proofed pension was common among members. She also said that the benefits of protection against inflation had been used to help justify low salaries by the Employer, when compared to colleagues in the United States. The Adjudicator said that he was unable to comment on what the Trustees did or did not know. Furthermore, no evidence had been provided of any comments that the Employer may have made and, in particular, whether it said that pension increases on Ms Y’s Pre 97 Excess Pension would be guaranteed. Regardless, benefits had to be paid in accordance with the TD&R and in the event of any discrepancy the TD&R would prevail.
37. Ms Y referred to how pension increases were described in the communications she received. She said that terms such as ‘discretionary’ and ‘not guaranteed’ were not interchangeable and that the Trustees were duty bound to make clear the meaning of the words they used and provide a glossary of terms.
38. The Adjudicator acknowledged there may be differences between the meaning of these two terms when in general use. However, in the context of how they had been used in communications with Ms Y, his view was that there was no material difference and that there was no requirement for the Trustees to provide a glossary of terms to explain them. In relation to a ‘discretionary’ pension increase, this indicates two things. Firstly, that the payment of an increase depends on one or more predefined entities deciding whether to pay it (that is, payment of any increase is not guaranteed). Secondly, if it is to be paid, the amount of the increase depends on a decision being made by those entities (that is, the amount of the increase is also not guaranteed).
39. Ms Y said that she had a right to non-guaranteed increases on her Pre 97 Excess Pension and that had been lost when the Scheme was wound-up. The Adjudicator acknowledged Ms Y’s disappointment that a part of her pension that had been increased periodically in the past would no longer receive increases. However, any such increases had been paid subject to the consent of the Employer and the Trustees and, as such, were not something that Ms Y was entitled to as of right. For this reason, the Adjudicator’s view was that there was no requirement for an allowance to be made with Just to provide future increases on Ms Y’s Pre 97 Excess Pension.
40. Ms Y referred to the introduction of statutory increases on pensions accrued after 5 April 1997 in excess of any guaranteed minimum pension. She asked why the Trustees did not include guaranteed inflation linked pension increases on Pre 97

Excess Pensions in the TD&R to ensure parity of increases for all members. The Pensions Ombudsman's role is not to make decisions on what is fair and reasonable. Rather, it is limited to a consideration of whether, or not, the TD&R and any relevant legislation have been followed properly by the Trustees.

41. Ms Y was provided with inconsistent information in relation to whether the Employer's consent was required to grant discretionary increases on her Pre 97 Excess Pension. However, while the Adjudicator's view was that this amounted to maladministration, he was not persuaded that Ms Y was caused sufficient distress and inconvenience to warrant an award for redress in this instance.
42. Ms Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms Y provided her further comments in response to the Opinion. These are summarised in paragraphs 43 to 58 below.
43. The Adjudicator's Opinion did not address that the Trustees breached the Disclosure Regulations. They had failed to inform members whether there was a power under the TD&R to increase pensions, what it was, who may exercise the power and whether it was discretionary.
44. It was very senior directors at Sotheby's who initiated group complaints to the Employer that the Scheme was not being run correctly and that they had been misled.
45. The Adjudicator's Opinion held every member of the Scheme to a much higher standard than the Trustees. That is that they should all have been able to decipher how the Scheme worked despite the Trustees issuing no or incorrect information and using muddled and misleading language.
46. The Adjudicator acknowledged that communications did not always accurately reflect who had the ability to increase her pension. Accepting that this was the case but deeming it to be a minor issue, when the Disclosure Regulations were the legal minimum, was to condone breaking the law and ignored the very severe consequences of that failure for every Scheme member.
47. It was not made clear to her that discretion included not paying increases at all, even if the Scheme's Actuary believed the Scheme could afford them. This was entirely contrary to the way the Scheme was thought to work. The refusal of increases created surpluses from which the Employer could benefit, and this was a clear conflict of interest.
48. While she could not evidence what members were verbally told, the Trustees and the Adjudicator had not proved that she and her colleagues were not misled.
49. The Leaving Statement described increases on the Pre 97 Excess Pension as "non-guaranteed". It did not state that "non-guaranteed" and "additional" increases were one and the same. So, how could the Adjudicator say with any certainty that they

were. The Trustees had never used “additional” to describe non-guaranteed increases in any other document.

50. Prior to her retirement in October 2013, she had been sent a pre-retirement statement which she considered to be more important than the Leaving Statement. This had set out all the information on which she had been asked to decide how she wished to take her pension, and it stated that:

“Your pension accrued prior to 6 April 1997 in excess of GMP will increase at Trustee discretion.”
51. In relation to the purchase of the policy with Just in July 2018, members were not notified that this did not include increases on the Pre 97 Excess Pension. The sole notification in the 2018 annual review did not mention pension increases at all.
52. Members of the Scheme were never advised that a new TD&R was enacted in 2004, nor informed that the TD&R could ever change. She questioned why the Adjudicator believed it reasonable that she would ask, and probably have to pay, to see the TD&R given that the Trustees’ independency and accuracy were never doubted by anyone. It would not have been necessary for her to see these if the Trustees had adhered to the Disclosure Regulations.
53. She never believed that her Pre 97 Excess Pension was subject to statutory increases, so did not understand the point that the Adjudicator was making when reviewing the current and historic TD&R. She was misled into believing that the Scheme had increases built into the TD&R but this was not the same.
54. Furthermore, the Adjudicator’s analysis of the TD&R ignored the fact that the Disclosure Regulations were there to ensure Trustees inform members whether or not the TD&R guarantee pension increases.
55. Neither she nor anyone she knows is aware of the existence of the April 1994 Booklet.
56. The Adjudicator noted that the Booklets referred to the TD&R as being the formal documents that governed the Scheme, and that the TD&R were available to view on request. However, this ignored the fact that her trust in the Trustees was total. No Senior Director had doubts as to the accuracy of what they were being told and saw no reason to do so. The Opinion did not address why she should be less trusting than those who ran the Employer, sufficient to query the Trustees and ask to see the TD&R to discover whether or not she was being told the truth.
57. The Adjudicator referred to her awareness that the Employer was likely to be involved in the pension increase process as a result of the information in the Leaving Statement. She considered that this was not good enough and either a member was aware or was not aware. She said that she was not aware as it would have been contrary to everything she had been told for 25 years. The Adjudicator also ignored that this document was the only one where ‘additional’ was used to describe some

form of increase. 'Additional' was never defined nor did it appear in the extracts from the TD&R in Appendix 2. She never considered that Aon meant something other than how she read the word 'additional'.

58. The Adjudicator's comments on the usage of 'discretionary' and 'not guaranteed' ignored how increases were understood by all the members of the Scheme including Chairmen and Managing Directors. The Adjudicator was accepting that trustees can use whatever language they choose, without explanation, definition or consistency.
59. I have considered the additional points raised by Ms Y; however, they do not change the outcome. I agree with the Adjudicator's Opinion.

Ombudsman's decision

60. Ms Y's complaint concerns increases on her Pre 97 Excess Pension. She is unhappy that:
 - she was not informed that the power to grant such increases was no longer solely vested in the Trustees; and
 - she was not informed that the historic increases she had been made aware of over a period of 25 years of employment were not guaranteed by the TD&R.

The rights under the TD&R

61. In relation to Pre 97 Excess Pension, I have reviewed the TD&R that have been in force since the Scheme commenced. I note that the TD&R dated 30 March 2004 and 9 December 1994 explicitly refer to the consent of the Principal Employer being required before this element of pension can be increased. I further note that the TD&R dated 22 April 1982 and 27 February 1974 refer to the payment of a sum by the Employer to fund any such increase. So, I agree with the Adjudicator's view that there was never a time when the Trustees had sole control over the provision of increases on Pre 97 Excess Pensions.

The information provided in relation to those rights

62. Schedule 1, Paragraph 13 of the Disclosure Regulations refers to the disclosure of information relating to increases to pensions in payment. Regulation 4 (an extract from which can be found in Appendix 4) details the circumstances in which trustees of a scheme are required to share the information specified in Schedule 1.
63. The Disclosure Regulations came into force on 6 April 1997, at which time Ms Y was an active member of the Scheme. Under paragraph 2 of Regulation 4, Ms Y was entitled to receive the information in Schedule 1 by 5 April 1998. She was also entitled to receive it if a change in relation to the Scheme resulted in a material alteration to the information.
64. In October 1997, an updated version of the Booklet was issued, and, on the balance of probabilities, I consider that Ms Y would have received a copy. As well as setting

out the increases to pensions that were provided as of right (for example, that applied to the post 1988 guaranteed minimum pension), this version of the Booklet also referred to the increases on “the rest” of Ms Y’s pension not being guaranteed, but being subject to review by the Trustees and the Company. Ms Y’s Pre 97 Excess Pension was covered by this statement. Furthermore, as discussed in paragraph 61 above, there had been no change in who had control over the provision of increases on Ms Y’s Pre 97 Excess Pension. So, there was no material alteration that would have triggered a requirement for the Trustees to send this information again. I do not agree with Ms Y’s assertion that the Trustees breached the Disclosure Regulations.

65. Ms Y has referred to group complaints that she says senior directors made to the Employer concerning the running of the Scheme. The scope of my investigation is limited to the complaint that Ms Y made to The Pensions Ombudsman. I am unable to take into account complaints made by other individuals to other organisations.
66. Ms Y mentions the understanding that the Scheme’s membership had of certain aspects of the Scheme’s design. She has also referred to whether Senior Directors had any doubts in relation to the accuracy of what they were being told. Again, I am unable to consider what other members of the Scheme may or may not have understood or doubted; no evidence can be provided in this respect.
67. Ms Y said that the Adjudicator held the Scheme’s membership to a higher standard than the Trustees in that they were expected to have been able to understand how the Scheme worked despite the Trustees’ use of misleading language and them issuing no or incorrect information.
68. One example that Ms Y has given of where she considers misleading language was used is in relation to the use of “not guaranteed” and “discretionary”. She said that it was not made clear to her that “discretionary” included not paying any increases on the Pre 97 Excess Pension. While I recognise that pensions often appear to have a language of their own, I do not agree that these terms are ambiguous in the context in which they were used, and that additional explanation was required. Nor do I agree that the use of “discretionary” suggests that an increase would be paid, and it was only the amount of the increase that needed to be decided. Had Ms Y been uncertain of how these terms were being used, then she could have asked the Trustees for clarification.
69. As acknowledged by the Trustees, a number of the communications issued to Ms Y suggested that the Trustees had sole control over granting increases on Pre 97 Excess Pensions when, in fact, the Employer’s consent had always been required. I find this to be maladministration on the part of the Trustees.
70. While the Leaving Statement referred to “non-guaranteed” and “additional” increases, there is only one set of provisions in the TD&R concerning pension increases that are not guaranteed by legislation. For the reasons stated by the Adjudicator in paragraph 32 above, I find that Ms Y would, on the balance of probabilities, have had at least some awareness, in November 1998, that the Employer may have some role to play

in granting pension increases. I note that Ms Y has said that she did not have this awareness.

71. Ms Y has referred to a statement she received before her retirement in October 2013 which she says stated that her Pre 97 Excess Pension would increase at the discretion of the Trustees.
72. Despite the information on pension increases in the Leaving Statement being inconsistent with some earlier communications and the information Ms Y received shortly before her retirement, I have seen no evidence that Ms Y queried this with the Trustees at the time. I consider that it is likely, on the balance of probabilities, that Ms Y's interest in this subject has been triggered by more recent events; in particular the wind-up of the Scheme and the purchase of an insurance policy to cover the payment of her pension. Nonetheless, I agree that this could have been better drafted to include reference to the role of the Employer, and as such strays, just, into maladministration. However, it does not alter the general premise that any increase applied to the Pre 97 Excess Pension was discretionary and, thus, not guaranteed.
73. Ms Y has referred to increases on Pre 97 Excess Pensions not being granted in times when the Scheme's Actuary believed the Scheme could afford them and how this created a surplus in the Scheme. It is likely that the financial health of the Scheme would have been one of the factors that the Employer and Trustees considered when deciding whether to grant an increase. However, there was no requirement for them to pay an increase even if the Scheme could afford it. The payment of an increase was at their discretion.
74. Ms Y said that, while she could not evidence what members of the Scheme were verbally told, the Trustees and the Adjudicator had not proved that she and her colleagues were not misled. However, the burden of proof is on Ms Y to evidence that allegation. It is not possible for me to comment on conversations that may have taken place when there is no evidence of what was said. I cannot prove that Ms Y was not misled; the emphasis is on Ms Y to provide evidence to back-up her assertion that she was misled, which I appreciate is unlikely to be possible given that these were historical conversations.
75. Ms Y said that, in July 2018 when a bulk annuity policy was purchased with Just, she was not made aware that increases on Pre 97 Excess Pensions were not included. I have seen no evidence that Ms Y was provided with this information at the time. However, I note that she was advised in August 2014 that such increases would only be granted in exceptional circumstances going forward.
76. Ms Y questioned why the Adjudicator believed it reasonable that she would ask, and probably have to pay, to see the TD&R. As discussed in paragraph 72 above, I consider that Ms Y received conflicting information on a matter that she suggests was of importance to her, and had the opportunity to either raise a query with the Trustees or ask to view the latest TD&R to clarify her understanding.

77. Ms Y said she did not understand the point the Adjudicator was making when reviewing the various versions of the TD&R. In a complaint like this, as an initial step, it is important to understand what pension increases the Trustees were legally required to provide. Furthermore, Ms Y claimed that the Trustees failed to inform her that the power to grant inflation proof increases on Pre 97 Excess Pensions was no longer vested solely in them. The Adjudicator's analysis confirmed that the Trustees never had the sole power to provide such increases.
78. While the Trustees have been responsible for maladministration, it is not in my view significant, and I do not find that Ms Y has suffered a financial loss as a result of their actions. Furthermore, I do not consider that Ms Y was caused sufficient distress and inconvenience to warrant an award for redress in this instance. The minimum payment for non-financial injustice that I award is £500 and this threshold has not been met in this case.
79. I do not uphold Ms Y's complaint.

Dominic Harris

Pensions Ombudsman
13 September 2024

Appendix 1

Extract from the Pensions Act 1995

“51 Annual increase in rate of pension

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

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

[...]

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

CAS-104626-P4X8

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

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

Appendix 2

Extracts from the Scheme's governing documentation

Definitive Trust Deed and Rules of the Sotheby & Co. 1971 Pension Scheme dated 27 February 1974

“Contributions [...]

6. (1) The Employers shall pay the Trustees:

- (i) in respect of the provision (if any) to be made for any augmentation of relevant benefits under Rule 8 (such augmentation to be limited in any event to such amounts as would not cause the total of the relevant benefits payable to any person to exceed the various limits described in Rule 25) the sum or sums determined by a certificate in writing of the Actuary payable as stated in the certificate. [...]

Trust Deed and Rules of the Sotheby Parke Bernet & Co Pension Scheme dated 22 April 1982

“ELIGIBILITY, CONTRIBUTIONS AND BENEFITS [...]

7. Participating Employers' contributions [...]

- 7.C Any Participating Employer may pay special contributions into the Scheme and give instructions to the Trustees concerning the provision of benefits for Employees or former Employees of that Participating Employer or their dependants and such benefits shall be paid in accordance with the Rules as the Actuary shall certify subject to such benefits not prejudicing approval of the Scheme by the Commissioners of Inland Revenue. [...]

Consolidated Trust Deed and Rules of the Sotheby's Pension Scheme dated 9 December 1994

“SECTION X GENERAL RULES CONCERNING ADMINISTRATION

38. Increases in current pensions

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

"B22. Increases in current pensions

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

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

Appendix 3

Extracts from the Scheme's Booklets

'The Sotheby Parke Bernet & Co Pension Scheme' dated March 1978

"About the Scheme [...]"

You should regard this booklet as mainly explanatory because your entitlement to benefit is governed exclusively by the formal documents constituting the Scheme. These documents may be inspected at any reasonable time, and, in the event of any inconsistency between this booklet and the formal Trust Deed and Rules, the latter shall prevail. [...]"

The Amount of Your Pension [...]"

E. Pensions Increases after Retirement

It is the intention of the Trustees, as at present, to review the pensions being paid out of the Scheme and to adjust them from time to time in the light of economic conditions prevailing at the time of the review and provided the Scheme's resources permit."

'Your guide to Sotheby's Pension Scheme' dated May 1988

"Normal Retirement [...]"

How will my pensions be increased?

Pensions under the Scheme are reviewed by the Trustees every year with a view to helping protect their value. [...] Increases on the rest of your pension [including the Pre 97 Excess Pension] are not guaranteed but the Scheme has an excellent track record. Between 1974 and 1988 for instance, increases on all the pension were made each year, ranging between 5% and 10%. [...]"

and finally [...]"

This booklet is intended as a guide only. The formal documents governing Sotheby's Pension Scheme are the Trust Deed and Rules. Please contact the Scheme Secretary, whose name appears at the front of this booklet, if you wish to see them or if you have any queries about the Scheme."

'Your guide to Sotheby's Pension Scheme' dated April 1994

"Normal Retirement [...]"

How will my pensions be increased? [...]

Increases on the rest of your pension [including the Pre 97 Excess Pension] are not guaranteed but pensions under the Scheme are reviewed by the Trustees and the Company every year with a view to helping protect their value, and the Scheme has an excellent track record. Between 1974 and 1993, for instance, increases to pensions in payment were made each year, ranging between 2.7% and 10%. [...]"

'Your guide to Sotheby's Pension Scheme' dated October 1997

"Normal Retirement [...]"

How will my pensions be increased?

Different parts of your pension are increased in different ways. [...]"

Increases on the rest of your pension [including the Pre 97 Excess Pension] are not guaranteed, but pensions under the Scheme are reviewed by the Trustees and the Company every year with a view to helping protect their value, and the Scheme has an excellent track record. Between 1974 and 1997, for instance, increases to pensions in payment were made each year, ranging between 2.1% and 10%.

In recent years, discretionary increases have been awarded so that the total pension has increased annually in line with price inflation. Whilst the Trustees and the Company have every intention that this level of increase will continue in future, this cannot be guaranteed. [...]"

Appendix 4

Extract from the Occupational Pension Schemes (Disclosure of Information) Regulations 1996 at 10 September 1997

“4. Basic information about the scheme

- (1) Subject to the provisions of paragraph (4), the trustees of a scheme shall furnish in writing the information specified in Schedule 1 to persons and trade unions in the categories specified in paragraphs (2) and (3).
- (2) The information specified in Schedule 1 shall be given as of course, where practicable, to every prospective member and where it has not been practicable so to do, such information shall be given to a person within 2 months of his becoming a member of the scheme, and to the extent that any information so specified has not previously been given to a person who was an active or pensioner member of the scheme on 5th April 1997, such information shall be given to that person by 5th April 1998.
- (3) The information specified in Schedule 1 shall be given to—
 - (a) any member or prospective member of, or beneficiary under, the scheme;
 - (b) the spouse of any member or prospective member; or
 - (c) any independent trade union recognised to any extent for the purposes of collective bargaining in relation to members and prospective members of the scheme,on request (except where the same information was furnished to that person or trade union in the 12 months prior to the request being made), as soon as practicable and in any event within 2 months of the request being made.
- (4) Where different information is applicable to different members, prospective members and beneficiaries, nothing in this regulation shall be construed as requiring the trustees to disclose information in relation to a member, prospective member or beneficiary that is not relevant to that person's rights or prospective rights under the scheme, or, where disclosure is made to a trade union, of any matter which is not relevant to the rights or prospective rights of members or prospective members who are of a class of employee in relation to which the trade union is a recognised trade union for the purposes of collective bargaining.
- (5) The trustees shall notify all members and beneficiaries (except excluded persons) of any change in relation to the scheme which will result in a material alteration in the information referred to in paragraphs 1 to 25 and 29 of Schedule 1, before that change takes effect, where it is practicable so to do, and in any event not later than 3 months after that change has taken effect.

- (6) When any information specified in Schedule 1 is provided, it shall be accompanied by a written statement that further information about the scheme is available, giving the address to which enquiries about it should be sent.”