Financial Ombudsman Service

complaint

Mr F has complained about advice he received in 1989 from The Analysts. He considers that it was *"fundamentally bad advice"* to transfer the value of his preserved pension benefits from The Mars Pension Plan into a section 32 plan.

background

The background to the complaint is set out in the attached provisional decision, which forms part of this final decision.

Within that provisional decision, I set out my reasoning as to why I considered the complaint should be upheld and the award I was minded to make. Mr F has made no additional comment in response to the decision. Both Mr M and his representative have made additional comments, which I summarise below.

procedural issues – the partners

Mr M's representative said that the provisional decision directed that the Partnership should pay redress to Mr F, which would mean that each of the former partners would be jointly and severally liable. But it said that a copy of the decision hadn't been sent to the executors of the deceased partner – and no reason had been given for this. Mr M had been making representations on his own behalf, rather than on behalf of the other partners of the dissolved Partnership.

The representative brought to my attention what it considered to be the Article 6 human rights issues (right to a fair trial) brought about by my directing that the former partners be jointly and severally liable to pay redress, but without being put on notice about the case and not being given the opportunity to reply. In the interest of fairness, it was queried as to why the executors hadn't been notified.

jurisdiction – the final response letter

Mr M's representative said that I'd made a finding of fact that the letter from the company acknowledging Mr F's complaint had been written in Mr M's personal capacity, but wasn't a letter from the company on behalf of the Partnership.

This was wrong for several reasons, the representative said:

- The letter was on company letter paper and signed by Mr M in his capacity as director.
- Nowhere in the letter did it say that Mr M was writing in his personal capacity.
- There was an inherent contradiction in the reasoning adopted that the letter was an acknowledgement of the complaint by the Partnership and the company, but not a letter by the company on behalf of the Partnership.

Mr M's representative said such a finding was open to serious potential challenge and I was asked to specifically address these issues and contradictions in my final decision.

revaluation of preserved benefits

The representative then addressed the effect of the revaluation of preserved benefits in The Mars Pension Plan. Although I commented on the 'guarantees' within the scheme, Mr M's representative said that there were no such 'guarantees' of any form.

As to my comment that the guarantees would have been enhanced appropriately on a yearly basis so that the purchasing power was preserved, the representative said that the scheme didn't do this. There was a revaluation limit of 5% which meant that if inflation was above this figure, purchasing power would only be partially preserved. At the time of the advice and for the following year, inflation exceeded 5% pa. In 1989 and 1990, RPI was 7.6% and 10.9% respectively. Mr F's purchasing power within The Mars Pension Plan would therefore have dropped by 8.5% in the first two years, the representative said.

In noting that the actual revaluation rate since 1989 would still have produced a pension higher than the lower projected growth rate, the representative said I was applying the benefit of hindsight. And he said that I hadn't noted the comments by Mr Roberts in his jurisdiction decision that, in 1996, the projected pension under the Norwich Union policy was still likely to be in excess of the preserved benefits in The Mars Pension Plan.

The representative also questioned what evidence existed that there was only a small risk of sustained inflation above 5% eroding the deferred pension. It said that historical experience was at odds with this – in the 14 years that Mr F was a member of The Mars Pension Plan, in only two years was RPI below 5%. In nine of those years, it was over 7%, said the representative. On the basis of the historical experience whilst in the scheme, there was a high risk of a sustained period of very high inflation. In those years, the UK government had sought to keep inflation down without much success.

He said that in the four years leading up to 1989, inflation had been on a sharp upwards trajectory – and quoted rates at 3%, 4.7%, 5.9% and 7.6%. Inflation was therefore rising at the rate of over 1.2% per year, the representative said. At the date of the advice, RPI was 2.6% over the 5% cap and rising and the recession of 1991 which caused inflation to drop wasn't a reasonable prospect at that time.

The representative also said that to rely solely on the government's stated aim of reducing inflation was unconvincing, given the trend was rising and previous governments had – in the main - failed to control it.

It was commented that, in my provisional decision, I'd said that there was the real risk that investment rates wouldn't grow during a high period of inflation so there was no reasonable assurance that the section 32 plan would work better for Mr F during such periods. However, the representative said that interest rates were the instrument by which the government sought to control inflation. If inflation rose too high, interest rates would be increased to suppress demand. The bank base rate in October 1989 was 14.89%, thereby enhancing the return of lower risk portfolios which were more heavily weighted towards interest-linked investments.

use of only the higher level of growth in illustrations

The representative then addressed my comments relating to the use of only the higher level of growth in comparative illustrations. If I was suggesting that Mr F hadn't been fully informed of the potential for his pension plan to be affected by fluctuations in investment growth, this wasn't supported by the evidence. The advice letter had set out that the ultimate pension would depend on future investment performance; Mr F had himself said that he knew the returns from the plan weren't guaranteed; and Mr Roberts had also commented that Mr F knew that the benefits weren't guaranteed.

With regard to my conclusion that Mr F couldn't have reasonably understood the extent to which he'd be exposed to risk with the section 32 plan because he wasn't fairly informed about the lower as well as the upper projected growths, this wasn't supportable, the representative argued, for the following reasons:

- The adviser's letter referred Mr F to the Norwich Union illustration and said it was important that he read it. It was clear that there was an upper and lower growth projection. Mr F also accepted that he read this.

- The lower growth rate was specifically referred to by the adviser – he said that *"it was important to recognise that the figures illustrated do not represent the upper or lower limits of the possible amount of benefits"*.

- Mr F had himself told this service that he understood the section 32 benefits weren't guaranteed. It had also been said in Mr Roberts' jurisdiction decision that Mr F knew that, at the lowest assumed growth rate, it might be worth less than The Mars Pension Plan benefits. But no mention of this relevant fact had been made in the provisional decision. This would be open to challenge, given its relevance to the extent of Mr F's understanding of risk.

The representative then commented upon my conclusion that the adviser's language in the letter suggested a certainty which was misleading. However, Mr F had already said that he knew the returns weren't guaranteed. Even if the letter was misleading, Mr F therefore wasn't misled by it.

It also wasn't fair to cherry pick sentences from the advice letter, the representative said. If the letter was read as a whole, clear risk warnings were given – and Mr F had never alleged that he thought the returns were guaranteed.

This issue was also pertinent to the findings on jurisdiction. If it was now contended that Mr F did think the benefits were guaranteed, then this reversed those findings. As Mr F would have known from the first annual statement onwards in 1990 that the benefits weren't in fact guaranteed, the complaint would be out of time.

The representative said that, in all the circumstances, it was illogical, unfair and unreasonable to conclude that the Partnership hadn't taken all reasonable steps to satisfy itself that Mr F had understood the extent to which he was exposed to risk. But even if it had, this service had already made a finding that Mr F knew that if he transferred, his benefits weren't guaranteed and that if his fund didn't grow at the lower projected rate, he'd receive lower benefits than in The Mars Pension Plan.

pensions Review Guidance

The representative addressed the pension review guidance referred to in my decision, and noted that I referred to the tests relating to "salesperson's statements". The representative indicated that neither the Partnership nor the individual adviser were 'sales persons' and weren't selling products – they were advisers. It was also queried as to why reference had been made to FIMBRA's pension review guidance.

impact of falling annuity rates

The representative referred to my finding that at the time of advice it was reasonably foreseeable that annuity rates would fall, along with pension incomes. But the representative said that there was no reference to contemporaneous evidence from the financial services industry or the regulators at the time which would support this.

The available evidence showed that annuity rates were increasing in 1989, rather than decreasing, it said. Reference was made to a report issued by the Universities of Bristol and Exeter on average historic annuity rates.

In any event, the representative said, my argument around annuity rates worked both ways. If it was reasonably foreseeable that annuity rates were decreasing, then it would have been reasonably foreseeable that the cost to The Mars Pension Plan of meeting its liabilities – along with risk of failure for the sponsoring employer - would increase. This was borne out by the numbers of sponsoring employers which had failed over the last 20 years.

other risks with the Mars Pension Plan

The representative also considered that I'd underplayed the risks of staying with The Mars Pension Plan. For Mr F to derive full benefits from the scheme, it would have needed to be fully funded for 20 additional years, an extra five years for Mr F to receive his GMP, along with the rest of his life and that of his widow and dependants. There was, it said, a material risk that an employer would not be able to fund a scheme over a period of some 40 years.

It was contended that, in highlighting the risks of poor investment performance and annuity rates over the period to retirement, I hadn't taken the same approach to the risks of staying with the employer's scheme – and so had implicitly suggested that there was no risk. This was even though the same issues of poor performance and falling annuity rates would adversely affect the solvency of the employer as well.

The representative said that, had the employer failed, Mr F would have been in a worse position as there was no Pension Protection Fund at the time – but with the section 32 plan, Mr F would have been assured a guaranteed minimum return.

errors in the statement of redress

The representative then addressed the calculation which this service had undertaken to determine redress. This had set out that the deferred pension at the date of leaving was £14,097.20. Of that, the non-GMP element was said to be £12,796.68 and the GMP to have been £1,300.50. But in my decision, I said that Mr F's entitlement to a maximum deferred pension of £18,301.97 per annum payable at age 60 was reduced to £13,577 as a result of the drop in RPI in the years since he left service. But this couldn't be right, the representative said, as this would mean that the non-GMP element only grew by £780.32 over 20 years. It was therefore suggested that the deferred pension amount used to calculate redress had been overstated.

Furthermore, the representative said, The Mars Pension Plan calculated in 1989 that the maximum pension Mr F could have accrued by age 60 was £18,301.97 per year – by applying the maximum 5% revaluation. The representative's rough calculation showed that, at 5% compound over 20 years, the maximum deferred pension would be 152% more than at the date of leaving. It therefore seemed that the deferred pension couldn't have been anywhere near £14,097.20 and was more likely between £6,000 and £8,000, plus the GMP. The figure used of £14,097.20 was inconsistent with and contradicted the annuity figure payable in the statement of redress of £11,949.23, the representative said. It was further stated that the statement of redress provided for a widow's pension of 66.7%, but The Mars Pension Plan provided a 50% widow's pension.

Mr M also responded to the provisional decision. He set out the same concerns as the representative over my description of the scheme benefits as being "guaranteed". He also submitted the same argument relating to the level of RPI in 1989 and 1990 and that purchasing power wouldn't have been preserved by a 5% revaluation in those years.

Mr M also echoed the representative's contention that the risks of remaining in the scheme had been underplayed, given that by 2000 The Mars Pension Plan was quoting a deferred pension at age 60 of £13,577 – from £18,301 quoted in 1989.

Mr M also said that if the GMP figure of £1,301 was deducted from the accrued pension figure set out in the actuaries' "key facts and assumptions" part of its calculation, this resulted in a pension entitlement at the date of leaving of £12,796 pa.

But Mr M said that if this was revalued at 5% pa over 19 years, this resulted in a pension of £32,304 – far in excess of the maximum deferred pension quoted. This in Mr M's view cast the calculation in some doubt.

Mr M also said that it was impossible to fit the maximum figure of £13,577 quoted in March 2000 in between the figure of £12,796 quoted by the actuaries as being the entitlement in 1989 and that of £18,301 quoted as the maximum possible by The Mars Pension Plan in 2008.

Mr M also raised the matter of the deceased partner's estate not being notified about the provisional decision in the same terms as the representative. It was also noted that the partner in question hadn't been notified about the complaint in the 18 months between this service receiving the complaint and his death.

my letter regarding redress

In response to the particular issues relating to the redress calculation, I responded in the following terms in a separate letter dated 27 March 2017.

I explained that it was the administrators of The Mars Pension Plan who provided the pension figure at date of leaving of £14,097.20. Using the deferred pension figure of £18,301.97 at age 60, the firm of actuaries who'd carried out the loss assessment contacted the scheme administrators to suggest that the split of benefits at the date Mr F left employment was as follows:

- Total pension £12,862.80
- Pre 88 GMP £1,205.36
- Post 88 GMP £95.16
- Pre 01/01/85 Excess £8,000.16
- Post 01/01/85 Excess £3,562.12

I mis-stated the last two of these as being “pre 01/01/88 Excess” and “post 01/01/88 Excess”, which I believe has caused some unintended misunderstanding on that particular point and I’ll deal with presently. The administrators responded to this, saying that the actual split was as follows:

- Total pension £14,097.20
- Pre 88 GMP £1,205.36
- Post 88 GMP £95.16
- Pre 97 Excess £12,796.68

The actuaries were able to split the Pre 97 Excess into a pre 01/01/85 excess, with no increase in deferment, of £8,854.27 and a post 01/01/85 excess, increasing in deferment, of £3,942.41.

With regard to reconciling the figure of £14,097.20 with the reduced pension of £13,577 quoted by The Analysts (Pensions & Investments) Ltd in March 2003, I also asked for additional detail as to how this might be explained. Willis Towers Watson, the scheme administrators, responded as follows:

“I can confirm that figures provided in our email dated 5 December 2016 accurately reflect the date of leaving benefits accrued by Mr F.

The figure of £17,727.60 a year was calculated using the pro forma and rules in force at the members Normal Retirement Date. All actuarial assumptions and revaluation orders that were applicable as at 28 December 2008 may differ from such variables in place at the time any previous figures you have quoted were provided. The figure you have quoted of £18,301.97 a year that was quoted from a letter dated 10 August 1989, would have made assumptions applicable at that time on future revaluation and employ the factors that were in force at the time.

All retirement projections provided are an estimate of benefits payable at the specified date of retirement and may not convey the actual rights at retirement. You will note on the document dated 10 August 1989 the estimated benefit quoted of £18,301.97 is the maximum deferred pension. Therefore the figure of £17,727.60 falls within this parameter.

There is also reference to the figure of £18,301.97 deriving from the maximum revaluation of 5% a year where this is not the actual revaluation that would have been applied at the time of Mr F’s Normal Retirement Date. Mr F’s deferred pension (over the GMP) built up after 1 December 1984 is increased by Price Inflation up to 5% for each year between his date of leaving and Normal Retirement Date. All benefits accrued prior to 1 January 1985 do not revalue in deferment. We are unable to comment on how previous figures were calculated before Willis Towers Watson administered the Mars Pension Plans.”

I also noted that the administrators had responded to Mr M directly setting out the basis of the figures provided (in which the mistake I made with the years 1985/88 above hadn’t been repeated – and so the dates were accurate).

I also said that the calculation undertaken by actuaries placed a capital value on the benefits that would have been provided by The Mars Pension Plan. As shown on the Summary of Loss Assessment, that value was £597,192. It allowed for increases in the preserved pension from the date of leaving. And the value of the benefits of the Section 32 plan was calculated as being £296,219. A comparison of those two values demonstrated a loss of £300,973.

I explained that the loss figure was then split into a past loss and a future loss. The past loss amounted to £75,729.16. The future loss was £225,243.07. To make good the future loss, the loss figure was converted into an annuity based on the same structure as the actual annuity in payment to Mr F – not the other way around. It would have been possible to use a different structure, which would have affected the annual annuity. Had the statement of redress referred to an annuity with 50% widow's benefit, the annual annuity would have been higher. But the actual future loss figure – the purchase price of the annuity – wouldn't have altered.

But I also made it clear that the loss calculation itself used to determine the loss has factored in the 50% spouse's benefit from The Mars Pension Plan – not a 66.7% benefit.

I said that, overall, given that the figures used in the loss calculation had been re-checked by the scheme administrators, I was satisfied that the calculation did, as far as was possible, accurately reflect the benefits that were given up when Mr F transferred from The Mars Pension Plan.

I also clarified, in response to the representative's query, that the pension review guidance was issued by the PIA, FIMBRA's successor.

Mr M's reply

Mr M replied on 6 April 2017, saying that the figures for the pre and post 01/01/88 Excess provided by the actuaries and the scheme administrators were still inconsistent and that it was unclear which had been included in the calculation. The pension entitlement of £3,942.41 accrued between 1 January 1988 and his date of leaving service on 5 May 1989 would mean that Mr F's salary would need to have been approximately £120,000 pa. But it was known that Mr F's actual salary was less than half of this.

Mr M also noted the scheme administrator's comment that the actual revaluation figures may have changed over time, but any loss figure should be calculated using the same assumptions as were provided to the Partnership in 1989.

Mr M queried as to why the pre and post 1988 Excess figures used a different date to the December 1984/ January 1985 point at which accrued benefits would become subject to revaluation - although Mr M said he was aware that The Mars Pension Plan had been "revamped" twice in 1985 and 1987. Mr M also asked whether the loss calculation had used Mr F's first wife's date of birth, or that of his second wife who was younger than he.

Mr M also said, with regard to the spouse's benefit, if using a 50% widow's benefit would have made the annuity higher, the annuity could have been reduced to the required level and the cost of buying that annuity (and so the loss) would have been reduced.

It was referenced in the provisional decision that Mr F's deferred pension at age 60 had reduced to £13,577, Mr M said. This had been related to the difference between £14,097.20 as at the date of leaving (used in the loss calculation) and the amount of £1,300 in respect of the GMP. Both of those figures related to Mr F's benefits at the date of leaving the scheme in 1989. If they were correct, they couldn't exceed Mr F's maximum pension at age 60 - which the figure of £13,577 did.

Mr M was confused by the suggestion that Mr F's maximum pension at age 60 was quoted as £18,301 pa in August 1989, was quoted again by the scheme administrators as £13,577 in March 2000, whilst now being quoted as at the date of leaving as £14,097.20.

Mr M could relate the entitlement as at leaving to the maximum at normal pension age, depending on the proportion of Mr F's benefits that were subject to revaluation. He could also relate the two maximum amounts at age 60, especially if all of the benefits were subject to revaluation. But this would mean that Mr M's entitlement at the date of leaving would need to be in the region of £7,000 pa.

With regard to my comments on the possibility of Mr F switching to a personal pension at maturity, Mr M said that if he'd done so he wouldn't have needed to buy an annuity. A "normal GAD" would have provided a greater income than the annuities he did buy. He also wouldn't have needed to buy a "contingent spouse's annuity", nor "increasing annuities" – rather he could have varied his drawdown income over time.

Any calculation of loss should be a comparison with a personal pension rather than a section 32 contract, Mr M said. This was especially so as the section 32 plan had to guarantee the GMP, increasing with RPI, and starting payment five years before The Mars Pension Plan would have started to make the same payments. By doing so, both past and future loss would be reduced.

As to my comments about the risks of entering drawdown, Mr M acknowledged that risk would be involved, but he noted that by 1999/2000 Mr F had described himself as a "sophisticated investor".

Mr M said that Mr F had the choice of leaving his benefits with The Mars Pension Plan - where according to the scheme administrator's figures, about 70% of the benefit was "frozen" – or transferring to a private policy.

The Partnership never advertised or cold called and sent no mail shots – all clients (including Mr F) contacted the Partnership. Following initial discussions with Mr F, the adviser recommended that he transfer into the section 32 plan, and that at some later date, if in his best interests, a switch to a personal pension could be arranged. The provisional decision said that Mr F might have mitigated his loss if he'd later switched to a personal pension or entered into drawdown. There was no question of Mr F mitigating his loss, Mr M said. The question was whether Mr F followed the adviser's recommendations and so whether the adviser was responsible for any loss.

Mr M said it had been suggested that the adviser had placed disproportionate emphasis on the higher of the two projections. However, the scheme benefits had been quoted as a maximum assuming maximum revaluation between 1989 and 2008. And the section 32 plan illustration had also contained a statement on the effect of inflation. This explained that the investment growth rates comprised of two parts, the inflationary element and the real rate of return.

Mr M said that by deducting the 5% RPI used by the scheme, the higher rate of 13% produced an 8% real return. The Norwich Union guaranteed roll up of 5.75% reduced the required annual bonus to 7.25%.

He said that at the lower assumed growth rate of 8.5%, the deduction of 5% RPI produced a 3.5% real return. The Norwich Union guaranteed roll up of 5.75% reduced the required annual bonus to 2.75%.

The Norwich Union annual bonus declaration for 1989 also said that it was maintaining – over several years, not just one year – the annual bonus of 14%. This was almost double the annual bonus required to support the higher rate assumption and five times the annual bonus required to support the lower rate, Mr M said. Mr M couldn't see that a proper comparison could be done between an investment that is guaranteed (at 5.75% pa) to exceed maximum LPI and a deferred annuity which relied on maximum revaluation of 5%.

Norwich Union annuity rates assumed an interest rate of 10% pa for the higher rate and 8% pa for the lower rate. In 1989, annuity offices thought that annuity rates would remain high for the next couple of decades and most offered guaranteed annuity rates. Mr M had submitted a schedule to this service for a personal pension policy with a different provider. This had an application date of 17 July 1989 and the original pension date was 20 September 2009. This exactly matched the dates of Mr F's deferment and the guaranteed annuity rate was 12.438%. Therefore, Mr M said, an annuity rate of 10% pa couldn't be considered "over emphasised".

As to Mr F's retirement plans, whilst it was noted that I'd said that he hadn't planned early retirement, Mr M said that neither did he plan late retirement. He certainly didn't wish to receive part of his pension on reaching age 60 and the rest at age 65, Mr M said. Mr F wished to be able to take his benefits at any time between 50 and 75, as allowed by regulations at the time and without having to make prior commitments. This was one of the factors which led the adviser to recommend a later transfer to a personal pension, if beneficial.

Mr M said that that the effect of longevity on annuity rates was very minor compared to the drop in interest rates. In 1989, interest rates were above 10% but since 2008 they had been fractions of 1%, Mr M said. The life expectancy of a 60 year old may have been about 80 in the 1980s and may have risen to 85 by now. Mr M set out four examples of how lower interest rates would adversely affect the annuity provided by the same capital sum.

Mr M said that Mr F's new IFA recorded that discussions had been held regarding his pension arrangements, including the options of each plan, and that he had agreed with Mr F that they would be left as they were. As Mr F was over 50, he would have been aware that he could take benefits from his personal pension, and the discussions would have covered the right to switch the section 32 plan into the personal pension. Either Mr F was made aware that taking benefits from a personal pension didn't require annuity purchase and he could leave the benefits invested for as long as he wanted, or this wasn't discussed and constituted a serious breach of the regulator's regulations.

Either way, Mr M said that there was a break in causation of risk and/or if Mr F continued to rely on the Partnership's recommendation, then he didn't follow them.

In summary, Mr M said that:

- Many of the aspects and problems could have been "cleared up" immediately had Mr F or this service approached the adviser in March 2011.
- Mr F didn't fully follow the adviser's recommendations.

- The loss calculation was based on the wrong retirement assumptions as to the retirement date and particularly by using section 32 fixed figures rather than the flexibilities offered by a personal pension.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

1. ***the deceased partner***

Mr M and his representative repeat their concerns regarding this service's decision not to correspond with the estate of the deceased partner. They make repeated claims that Article 6 and/or natural justice have been breached by that decision. But they don't say anything new on the issue and, as a result, my views haven't changed. I maintain that the interests of fairness and due process are met by my decision to correspond with the former partners of the Analysts who are still alive. I don't consider that natural justice can only be served in this case by also corresponding with the executors of an estate that's in any case likely to have been distributed many years ago.

In making this decision, I'm satisfied my stance is supported by the judgment of the High Court in *R (Bruce) v FOS [2007] Pens. L.R.287 [33]* in which Mr Justice Hodge held that natural justice hadn't been breached where a former partner of a dissolved partnership had not been given the opportunity to make submissions in respect of a complaint to this Service. I note that the court was satisfied that the dissolved partnership had been aware of the investigation, by virtue of our correspondence with another former partner.

Further, and in any event, I'm mindful that it's always been open to Mr M and his representatives to approach the deceased partner's estate directly, if they felt that doing so might have a material impact on the outcome in this case.

I therefore maintain my view that, in order to assume jurisdiction in this matter, I've correctly framed the complaint against the Partnership and not against the partners individually. I also remain satisfied that in the interests of fairness and due process, I should correspond with the former partners of that business who are still alive - but I don't consider it necessary to correspond with the executors of the estate of the deceased partner.

Finally, I've noted Mr M's comment that the issues raised in this complaint could have been "cleared up" immediately if this service had approached the now deceased partner when the complaint was referred to this service in March 2011 - when he was still alive. As I said in my provisional decision, it's regrettable that this case has taken as long as it has to reach this point. But I don't agree that a resolution would have been reached 'immediately' by approaching the deceased partner at the outset. It's fortunate that contemporaneous documentary evidence is available in this case and it seems to me that the evidence indicating the content of the actual advice given to Mr F is clear. What is contested, in the main, is the extent to which that advice was suitable for Mr F. And on that issue, Mr M has been able to give comprehensive submissions, with the assistance of his legal representatives. In turn, I don't agree that the outcome would likely have been any different had the deceased partner been approached at the outset.

2. jurisdiction – the final response letter

Mr M and his representative maintain the view that the letters from Mr M of 25 November 2002 and 14 February 2003 are not an effective acknowledgement of receipt of Mr F's complaint by the Partnership – the implication being that Mr F's complaint was made out of time. As I previously indicated in my provisional decision, I agree with Mr Roberts' findings on this issue. My view is that Mr Roberts rightly determined in his jurisdiction decision that Mr M signed the acknowledgement letter both as a director of (and therefore on behalf of) the company and as a partner (or former partner) of the Partnership.

The finding that Mr M was acknowledging receipt on behalf of the Partnership is supported by Mr M's own assertion to that effect within the terms of the letter itself. In his letter of 14 February 2003, he said *"I have taken your letter of the 23rd November 2002 to be a complaint against the advice given to you by* [the advising partner] *of the Analysts* [the Partnership] *in 1989."* Mr Roberts rightly indicated such evidence carried significant weight.

The representative says that there is an inherent contradiction in the reasoning I've adopted in order to say that the letter is an acknowledgment by the Partnership and the Company of the complaint, but not a letter by the Company on behalf of the Partnership. I'm afraid I'm not sure how this particular point takes the matter further for Mr M, but to be very clear, the extent of my finding on this issue aligns with that of Mr Roberts and is as follows: In my view, Mr M's letters to Mr F of 25 November 2002 and 14 February 2003 amount to a written acknowledgement or some other record of the complaint being received by him on behalf of both the Partnership and the Company.

3. revaluation of preserved benefits

Mr M's representative has questioned my use of the word "guaranteed" in connection with the preserved benefits of The Mars Pension Plan. But I'm afraid I don't agree that this is a material point. I'm satisfied that it's reasonable and appropriate, when comparing the respective pension schemes in this case, to refer to the underlying 'guarantees' which applied (or did not apply) to those respective schemes. I note, in fact, that this is consistent with the language used by the representative and Mr M himself when referring to the "guarantee" of the minimum bonus applied to the fund value within the section 32 plan.

And in its factsheet dated January 2016 and entitled "*Pension benefits with a guarantee and the advice requirement*", the Department of Work and Pensions set out the following when defining safeguarded benefits (with my emphasis):

*"Safeguarded benefits are defined in legislation as pension benefits which are not money purchase or cash balance benefits. In practice, safeguarded benefits are any benefits which include some form of **guarantee or promise** during the accumulation phase about the rate of secure pension income that the member (or their survivors) will receive, or will have an option to receive. These include:*

1. *under an occupational pension scheme, a **promised level of income** calculated by reference to the member's pensionable service in the employment of the pension scheme's sponsoring employer (for instance, under a final salary scheme)"*

All in all, I'm satisfied that this is a description which would reasonably apply to the Mars scheme benefits relinquished in this case and, in turn, the word "guarantee" seems entirely appropriate in that context.

Mr M and his representative have then referred to the revaluation of those "guaranteed", (or safeguarded) benefits with The Mars Pension Plan, and indicated that I have wrongly regarded this revaluation benefit as an effective means of maintaining the scheme's purchasing power. In doing so, it rightly points to the fact that purchasing power would ultimately be reduced if inflation exceeded 5% in any given year. It further says that in the 14 years of Mr F's membership of The Mars Pension Plan, RPI was less than 5% in only two years, and in the four years leading up to the advice in 1989, inflation was going up – exceeding 5% in 1988 and 1989 and reaching 10.9% in 1990.

I have again given careful thought to the points Mr M and his representative make. Firstly, I should say that I don't think it's appropriate to look, as suggested by the representative, at the first two years *after* Mr M purchased the section 32 plan as a guide to how suitable it was to transfer at the time the advice was given. This would indeed be applying hindsight to the assessment of suitability at the time of the advice. And in any event, even if I were to adopt a similar perspective, I note of course that in the longer term, inflation in the years *since* the advice has been for the most part comfortably below 5% pa.

I'd also say that it's not reasonable to give undue weight to the inflation figure in the year of the advice (1989). In my view, a longer view and trend analysis would have been more appropriate. Having done that, I acknowledge that there was a risk of inflation rising above 5%, thereby eroding purchasing power on a sustained basis. However, over the preceding ten years, the trend for inflation – notwithstanding a spike in 1980 – was to decrease. Over the preceding five year period, it had been largely stable. And only once in the preceding five years had it been higher than 5%. My analysis has relied on average RPI figures for those years from the Office for National Statistics - here are the annual figures for the preceding ten years:

1979 – 13.4%
1980 – 18.0%
1981 – 11.9%
1982 – 8.6%
1983 – 4.6%
1984 – 5.0%
1985 – 6.1%
1986 – 3.4%
1987 – 4.2%
1988 – 4.9%
.
The figures quoted by the representative appear to be those for the individual *months* of September 1986 (3%), September 1987 (quoted as 4.7% - although this was actually 4.2%), September 1988 (5.9%) and September 1989 (7.6%). I can find no match with particular full years' data – and consider the full years' average RPI rate to be more indicative than one particular month's rate in those years.

Finally, the representative has also argued that if inflation increased too much, the government of the day would implement monetary policy by raising interest rates to control it. It says that I have failed to take account of the fact that high inflation combined with high interest rates would benefit the interest linked investments which are associated with lower risk portfolios, such as Mr F's section 32 plan.

At the outset, I should say that any portrayal of a period of high interest *and* high inflation as either a desired or steady state for any investment portfolio, if that is what the representative is saying, is to my mind misguided. As noted by the representative, interest rates are typically increased to bring inflation *down*.

Further, I've carefully considered the asset composition of the section 32 plan in this instance, and note that it did *not* in fact have a high degree of its assets in interest-linked investments. On the contrary, a significant proportion of its assets were in equities. The breakdown of the assets held within the With Profits fund in 1989 was as follows:

Fixed Interest	4%
Property	33%
UK Shares	45%
Non UK Shares	9%
Unlisted Shares	9%

So any periods of increased interest rates to control higher inflation would not have significantly benefitted (certainly in the sense suggested by the representative) a With Profits fund with the above asset split.

If the economy entered recession, and inflation decreased (as suggested by the representative), the revaluation of the guaranteed scheme benefits was more likely to keep pace with inflation. But any accompanying sustained periods of modest investment growth in the section 32 plan due to the lower than expected performance of equities would result in poor returns for Mr F.

All in all, I maintain that the loss of the "guarantees" (or safeguarded benefits) available to Mr F with The Mars Pension Plan is a significant feature in this case which indicates against the suitability of the advice given to him to transfer away from that scheme in order to purchase the section 32 plan. Whilst I recognise that the scheme benefits weren't beyond peril (which I'll address presently), my view is that within the scheme there were simply fewer variables which could be impacted by either financial and economic conditions, or other factors such as decreasing annuity rates. The pension accrued at the date Mr F left The Mars Pension Plan was guaranteed to be paid at the scheme retirement date and was guaranteed to be revalued in line with RPI up to 5% per year (plus any discretionary increases the plan administrators applied).

By contrast, the statutory guarantee which applied to the section 32 policy was the relatively small part of the pension which represented the GMP (and which wouldn't be paid until state pension age). The guaranteed bonus was applied to the fund value transferred to the section 32 plan. This is quite different from the guarantee offered by The Mars Pension Plan outlined above, not least due to the fact that with the section 32 plan the ultimate pension to be paid would still be dependent upon the annuity rates that were available to Mr F at retirement.

4. use of only the higher level of growth in illustrations

As to the emphasis placed in the advice letter on the higher level of return in the illustration, again I maintain the views expressed in my provisional decision. For clarity, at no point in those findings have I suggested that Mr F thought that the section 32 benefits were guaranteed. Nor have I suggested that Mr F didn't read the documentation provided to him at the point of sale, including the enclosed illustrations. Instead, my concern is with the emphasis placed on the higher growth rate in the advice letter, together with the specific remarks made in connection with that rate and the likelihood of the fund performing well.

In focussing on those aspects of the advice letter, I don't agree that there has been any cherry picking here of those remarks. To remind the parties, the adviser said in his cover letter:

> *"Your deferred pension under the Mars scheme at age 60 is £18,301. Under the current rules and assuming inflation is at 5% per annum after the deferred pension comes into payment, the benefits would be augmented to £23,864 per annum at State Pension Age 65.*
>
> *This compares with … £32,300 at age 60, and with 3% per annum increases £37,445 at age 65. The total pension therefore over that five year period **will amount** to £74,322 and there **will be** approx. £13,581 extra per annum difference at age 65.*
>
> *I enclose the Illustration and Descriptive Literature … for your consideration. It is important to recognise that the figures illustrated do not represent the upper and lower limits of the possible amount of benefit. **What is actually paid will depend upon the future investment performance … but I believe that you can expect them to perform well.**"*

My emphasis is used here.

In focussing on the advice letter, I'm not dismissing the fact that risk warnings were given to Mr F by the Partnership. Specifically, I acknowledge that the insurer's booklet enclosed with the advice letter indicated that the deferred pension would almost always be guaranteed at a higher level than the basic level guaranteed in the new policy. It also said that policyholders couldn't be sure of the amount of their pension until it was payable and that the illustrations provided were "notoriously unreliable" as a true indication of what was eventually achieved.

But I remain of the view that the cover advice letter from the Partnership to Mr M would have been of particular importance to Mr F when deciding whether to act on the advice he was given. As I said in my provisional decision, it's conspicuous that in that letter, the adviser has focussed only on the higher growth projection in the section 32 illustration. Moreover, the language used suggests a certainty about the projected personal pension benefits that I consider to be misleading. This, as I say, was exactly the type of language highlighted by the regulator in its Pension Review guidance as an indicator of a compliance breach. Further, I remain satisfied that, despite the risk warnings contained in the enclosed literature, Mr F would have been significantly influenced by the overly assured language used by the Partnership in that advice letter.

As a result, I remain of the view that although risk warnings were given to Mr F by the Partnership, the emphasis in the advice letter on the likelihood of the investment performing well, together with the failure to draw Mr F's attention to the lower of the growth projections, misled Mr F about the nature of the risks involved.

In saying that, I'll repeat that it's <u>not</u> my view that Mr F thought that the projected benefits with the section 32 plan were guaranteed. Further, I accept that Mr F <u>did</u> read the illustration that was enclosed with Mr H's advice letter. So whilst he understood that at the lowest projected growth rate his pension may be worth less than the benefits within The Mars Pension Plan, he was misled about the risk of that happening because the advice letter gave disproportionate emphasis to the prospects of the plan performing well.

I'm also satisfied that this finding is compatible with the findings Mr Roberts made in his jurisdiction decision of 16 December 2015 (in particular, that Mr F knew the section 32 plan benefits weren't guaranteed and that he was aware that at the lowest assumed growth rate, the section 32 plan would be worth less than his Mars scheme benefits). I'm satisfied that those findings are entirely aligned with my own views as indicated above.

5. impact of falling annuity rates

Mr M and his representative have also said that this service has produced no evidence to support the conclusion that it was reasonably foreseeable at the time of the advice that annuity rates would fall in the future. My view was that the general trend in longevity – and indeed actual data on annuity rates at the time - indicated that, all other things being equal, it was reasonably foreseeable that annuity rates would reduce in the future.

Whilst the actual scale of reduction in annuity rates might not have been foreseen at the time of the transfer advice to Mr M, I do maintain my view that a likely reduction over time was reasonably foreseeable.

In saying this, I have carefully considered and taken account of the historical report compiled by the Universities of Bristol and Exeter on annuity rates, which was provided by Mr M's representative. But on my reading, this indicates the same medium term trend in annuity rates up to 1989 upon which I relied in my provisional decision. That is, over the preceding ten year period, annuity rates had been falling. There was in 1989 a slight increase, but as Mr M has himself also pointed out, this may be explained by fluctuations in interest rates and gilt yields. And I think it would have been inappropriate to disregard the risk of annuity rates falling based on that one year's data.

I therefore maintain my view that the general trend for annuity rates up to 1989 was one of reduction – and that all other factors being equal, this trend was reasonably foreseeable for future years, given increasing longevity in the general population. And whilst I haven't provided independent expert evidence on the point, as Mr M's representative points out, I note that even on the basis of the representative's own historical report, the evidence of an on-going reduction in annuity rates up to 1989 is clear.

I've considered Mr M's point that GARs (guaranteed annuity rates), which were offered by pension providers at the time to encourage long term loyalty from policyholders, would not have been offered if it were reasonably foreseeable that annuity rates would fall at the rate at which they did. In short they would have been too expensive and would not have been offered.

But I'm not sure I agree that that point assists Mr M. In my view, GARs were intrinsically attractive to investors for the very reason that, although they may not have been markedly different from standard annuity rates at the time they were attached to a policy, they nevertheless mitigated against the acknowledged risk that annuity rates might fall.

But I should say also that, even if I'm wrong about the reasonable foreseeability of annuity rates continuing to fall, it is my view that the mere possibility of annuity rate fluctuations constituted an additional (and for the reasons previously set out, unnecessary) risk to Mr F's pension benefits. Again, in short, The Mars Pension Plan offered a guaranteed preserved benefit based on Mr F's years of service and salary at leaving, together with discretionary increases and revaluation broadly in line with inflation – the level of benefits payable under the section 32 plan were, by contrast, dependent on market forces both in terms of the growth of the fund and, ultimately, the annuity rates offered at Mr F's retirement.

6. *other risks with The Mars Pension Plan*

Mr M's representative says I have wrongly dismissed the risk of failure of The Mars Pension Plan on the grounds of a lack of evidence that it was likely at the time. It further suggests I've made an implicit suggestion that there was no risk of such a failure by taking account of the risk of poor investment performance in connection with the suitability of the section 32 plan, but not in connection with the ability of an employer to meet its liabilities under an occupational scheme.

Firstly, I should clarify that I haven't dismissed out of hand the risk of The Mars Pension Plan failing. On the contrary, I very clearly acknowledged in my provisional decision that there were risks in remaining in the scheme. However, what I did say was that I'd seen no evidence to suggest that at the time the advice was given to Mr F, there was a reasonable prospect of The Mars Pension Plan failing, such that it would have represented a compelling reason to transfer.

I agree that in a general sense, certain factors would impact on a sponsoring employer's ability to meet the benefits owing under the scheme (specifically, the long period of time over which benefits would be payable together with poor investment performance and lower annuity rates). Nonetheless, there was no evidence in 1989 (or since, as far as I'm aware) to indicate that there was a reasonable prospect that The Mars Pension Plan in particular might not be able to meet its liabilities.

In light of that, I maintain my view that, absent any reasonable indication that The Mars Pension Plan was at particular risk of failing, the mere possibility of that happening was not a factor that might reasonably suggest the advice to transfer away from the plan was suitable.

7. causation and mitigation issues

In his reply to my redress letter, Mr M has again raised the point that Mr F's review of his pensions with his new IFA in 2001 constituted a break in the chain of causation arising from the 1989 advice. On my understanding, Mr M is suggesting firstly that the new IFA *did* advise Mr F to switch to a personal pension, and that Mr F unreasonably failed to do so. Alternatively, if the new IFA failed to advise such a switch, Mr M suggests it ought to have done so and that that failure has in turn broken the chain of causation.

I've carefully considered what Mr M says and have again had regard to the content of the report provided to Mr F by his new adviser in 2001. I remain satisfied that there's nothing in that report to suggest that the new IFA advised Mr F to switch to a personal pension or to take any action other than to keep his section 32 plan in place. I therefore disagree that there's any basis on which it can be said that Mr F unreasonably failed to take steps in response to that advice.

Further, as I've previously indicated, a switch to a personal pension in order to take income drawdown is an inherently more risky strategy than purchasing an annuity, and there's no evidence available in any event to indicate that Mr F was likely to have been better off by doing so. Whilst I do recognise that Mr F regarded himself as a 'sophisticated investor' by the time he spoke to his second IFA, that does not by extension mean that such a strategy would have been suitable for him in the circumstances.

Given that the residual guarantee derived of "contracted out" membership of The Mars Pension Plan (the GMP) would be relinquished by doing so – and by then entering income drawdown Mr F would be exposed to elevated risks, it's not a strategy that I would necessarily expect a consumer such as Mr F to naturally adopt. Nor is it a higher risk strategy that I think he should have been expected to adopt to try to replace his occupational pension scheme benefits.

But even if Mr F had transferred to a personal pension plan and entered income drawdown, given the risks attached, it would have been by no means certain to achieve an objective of matching his occupational pension scheme benefits. If a required fund growth rate needed to sustain Mr F's income withdrawals wasn't achieved, it could in fact have produced a worse outcome for him than remaining in his section 32 plan.

In my view, it was entirely foreseeable that Mr F might obtain further financial advice about his section 32 plan at some stage during its duration. When he did so in 2001, he was advised to keep his plans in place as he'd already transferred out of his occupational pension scheme. I've considered whether the second adviser might have more reasonably recommended that Mr F should reinstate his preserved benefit in his occupational pension scheme, but as I've said, The Mars Pension Plan administrators have confirmed that reinstatement was no longer available at that time.

In light of that, I don't agree that there is any evidence to indicate that the second IFA acted unreasonably and certainly not in a manner that might break the chain of causation emanating from the original transfer advice. I maintain my stance that Mr F's losses were caused by the Partnership's advice to transfer his pension and that there's no evidence that Mr F failed unreasonably to take steps to mitigate the loss he incurred.

Further, I remain satisfied that, but for the advice to transfer to the section 32 plan, Mr F would have remained in his occupational pension scheme.

8. *errors in the statement of redress*

Mr M has indicated ongoing concerns about errors he says were made in the loss calculation enclosed with my provisional decision. I wrote to Mr M in response to those concerns on 27 March 2017 and Mr M has again written in reply to say that he still has concerns about some of the figures quoted by the actuaries and those quoted by the scheme administrators.

I've given the points he makes very careful consideration and have referred his concerns to the actuaries we've used. At this stage, I should clarify that the loss assessment in this case was conducted by Hazell Carr, a reputable firm of actuaries who have been engaged by this service for many years. Hazell Carr has considered Mr M's concerns and has confirmed that, using a combination of actual available scheme information and reasonable assumptions where necessary, it's endeavoured to produce an accurate assessment of Mr F's losses arising from the transfer of his scheme benefits.

Nonetheless, I will address each of Mr M's concerns about the calculation in turn.

Firstly, the relevant date for splitting the excess over GMP into two parts, one of which would be subject to revaluation and one which wouldn't, was 1 January 1985 (in line with the Social Security Act 1985), rather than 1988. Mr M has rightly pointed out this discrepancy and I'm happy to confirm that the excess over GMP of £3,942.41 was apportioned to the post 1 January 1985 period of service rather than the post 1 January 1988 period. As set out previously, this is consistent with, and confirmed by, the information provided by the scheme administrators to both this service and to Mr M.

As to which of Mr F's first or second wives' date of birth the loss calculation used, this was Mr F's second (current) wife.

Mr M also suggested that, if using a 50% spouse's annuity would make the annuity higher, then it could be reduced and the overall redress cost reduced. But as I tried to make clear in my letter of March 2017 to Mr M, the loss figure is not calculated by reference to the annuity which would be set up. The loss figure is a fixed, determined sum derived of a comparison of the benefits Mr F is receiving from his section 32 plan, compared to the benefits he would otherwise be receiving from The Mars Pension Plan. From this figure an annuity could then be formatted either using a higher or lower spouse's benefit – which is why the annuity amount could vary.

As to Mr M's comments about Mr F's entitlement at the date of leaving (£14,907.20) to the maximum at normal retirement age, Mr M himself has said that this could be achieved depending upon what proportion of the overall entitlement was subject to revaluation. The split between the revalued and non-revalued parts of the excess over GMP is set out above. I'm mindful of Mr M's confusion as to how the entitlement quoted in 2003 of £13,577 could have been correct if the entitlement at the date of leaving service was £14,907.20. But my reference in the provisional decision to this amount derived of Mr M's own earlier reference to it. It's not a figure which has been repeated by the scheme administrators or has been used in the redress calculation.

As I've said, I'm not satisfied that transferring to a personal pension at a later date for the prospect of entering income drawdown would have been an ordinary or reasonable step for Mr F to take – nor that it would necessarily have reduced the losses Mr F now faces. And so it follows that I don't consider that the loss calculation should use the benefits which might have been obtainable from a personal pension policy as the appropriate comparator, rather than the benefits derived from the section 32 policy.

Mr M also said that the growth rates used in the Norwich Union illustration comprised of two elements, one of which related to the real rate of return and the other to inflation. Mr M has then deducted the 5% RPI revaluation used by the scheme from these growth rates to produce – as far as I can tell - alternative growth figures which he considers would reasonably have been deemed achievable at the time.

But no matter what proportion of the growth rate was used to account for inflation, artificially removing it would simply serve to reduce the growth projections, not the return which needed to be obtained to match the scheme benefits (bearing in mind here that this wasn't a critical yield calculation – rather a projection of potential benefits). The growth figures weren't artificially reduced to factor in the *effect* of inflation on a future pension - a separate table was provided to estimate this. Rather, it was included within an overall anticipated growth rate to try to allow for inflation. This is described in the illustration as follows:

"These figures have been calculated on the assumption that an average investment return of either 8.5% or 13% will be achieved each year in the period to retirement. Some part of this investment return will, however, be needed to compensate for the effects of inflation."

So the investment returns projected in the illustration included an amount designed to mitigate against the effects of inflation – but the amount projected was nevertheless the result of that overall growth rate being applied to the fund. For example, to attain a projected growth rate of 13%, the fund needed to grow by 13% - not 8%. An additional 5% wasn't "gifted" to the projection to take account of the effects of inflation. The only effect of removing the part attributed to mitigating against inflation would be to reduce the projected actual pension accordingly.

Mr M also re-iterated the bonus rate applied to the With-Profits fund in 1989 as being 14%. But I'd refer to my comments previously set out in the provisional decision regarding this and it's likely sustainability over the years left to Mr F's retirement.

summary

For all the reasons set out in both this and my provisional decision, I agree with the adjudicator that the advice given by the Partnership to Mr F to transfer away from The Mars Pension Plan wasn't suitable for him.

In doing so, I've taken into account the relevant law and regulations; regulator's rules, guidance and standards; codes of practice; and what I consider to have been good industry practice at the relevant time.

In particular, I've taken into account the following rules of FIMBRA (the regulator at the time the transfer advice was given):

4.4 best advice

4.4.1 A member shall not:

> *(a) give advice to any client concerning investments; or*
> *(b) recommend any investments to a client; or*
> *(c) arrange or effect any transaction in investments with or for a client … unless:*
>
> *(1) the member has fulfilled the requirements of Rule 4.2 in relation to that client; and*
> *(2) in light of the knowledge of the client so gained and having regard to any other relevant information which ought reasonably to be known to the member, the member has determined, using reasonable care in doing so:*
>
> *(i) which class or classes of investments;*
> *(ii) which particular investment or investments within that class or those classes; and*
> *(iii) where appropriate, which transaction or transactions;*
> *are the most suitable for the client.*

…

4.4.4 Subject to the following provisions of this Rule 4.4, in the case of a transaction relating to a life policy or a pension contract or collective investments, a member shall not recommend such a transaction nor arrange or effect such a transaction on behalf of a client … unless the member believes, having exercised reasonable care in forming its belief, that no transaction in any other such investment of which the member is or ought reasonably to be aware, and which would be available from the same or a different source, would be likely to secure the objectives of the client more advantageously than the transaction recommended, arranged or effected by the member

4.3 understanding of risk

4.3.1 …a member shall not recommend to a client a transaction in an investment or arrange or effect such a transaction with or for a client … unless, before the recommendation is made or the transaction is effected, the member has taken all reasonable steps to satisfy itself that the client understands the extent to which he will be exposed to risk or further liability by entering into the transaction.

I've also had particular regard to the PIA Pension Review guidance, which highlighted the following indicators of a compliance breach.

> *357 The firm should examine the information on file, and any information obtained from the occupational scheme, from the provider (if this is not the firm) and, from any direct contact with the investor to ascertain whether the investor was misled by the firm.*
>
> *358 For example, in connection with the salesperson's statements, the firm should be alert to evidence that:*
>
> - *the salesperson suggested that projected personal pension benefits were guaranteed or certain;*
> - *the salesperson put disproportionate emphasis on the higher of the two projections given under LAUTRO projection requirements;*

In short, and for the reasons outlined above and in my provisional decision, it's my view that the Partnership failed to take all reasonable steps to satisfy itself that Mr F understood the extent to which he would be exposed to risk by transferring to the section 32 plan. Whilst I accept that risk warnings were given, the over emphasis in the advice letter on the higher growth projection for the section 32 plan, together with the use of overly assured language suggesting a certainty about the plan performing well was likely to have misled Mr F about the risks involved. So whilst he understood that at the lowest projected growth rate his pension may be worth less than The Mars Pension plan, he was misled about the risk of that happening because the advice letter gave disproportionate emphasis to the prospects of the plan performing well. In turn, I'm satisfied the Partnership was likely to have breached FIMBRA rule 4.3.1.

Further, and again for all the reasons outlined above and in my provisional decision, it's my view that the section 32 plan wasn't the most suitable pension vehicle for Mr F in the circumstances – the best advice for Mr F would have been to remain in his occupational pension scheme. This, as I say, amounted to a likely breach of FIMBRA rules 4.4.4 and 4.4.1.

But even if I'm wrong when I say the advice was likely to have breached the rules of the regulator at the time the advice was given, I'm nevertheless satisfied that this is the fair and reasonable result in this case. Mr F wasn't a sophisticated investor when he approached the Partnership for advice. He clearly indicated to the Partnership that he had a conservative attitude to risk. But the Partnership failed to recommend a transaction that was compatible with that risk profile. Further, it misled Mr F about those risks so that he was unable reasonably to understand the extent of the risks he faced by transferring away from the relative security of his occupational pension scheme to the section 32 plan. In my view, taking into account Mr F's circumstances and objectives, reasonable advice at the time would have been to remain in The Mars Pension Plan.

Finally, in forming my assessment of the fair and reasonable outcome in this case, I've also taken into account the determination that the former ombudsman scheme (the PIAOB) would have been expected to reach (as I'm required to do in accordance with article 7(2) of the *Financial Services and Markets Act 2000 (Transitional Provisions) (Ombudsman Scheme and Complaints Scheme) Order 2001).* I'm satisfied my findings are aligned with the likely determination of that scheme.

my final decision

The firm of actuaries which undertook the loss calculation, Hazel Carr, determined in December 2016 that Mr F had suffered a loss of £300,972.23 by transferring away from The Mars Pension Plan.

Where I determine a complaint by upholding it, I have the power under the Financial Services and Markets Act 2000 to make a money award requiring a financial business to pay compensation of up to £100,000 (for cases referred to us before January 2012), plus any interest and/or costs that I consider appropriate. If Mr F accepts my determination, it's binding on The Analysts and Mr F and is final.

Where I consider that fair compensation requires payment of an amount that exceeds £100,000, I may recommend that the business pays the balance.

determination and money award: My decision is that I uphold the complaint and require The Analysts to pay Mr F £100,000.

If The Analysts doesn't pay within 28 days of being notified of Mr F's acceptance of a final decision, interest will be payable at the rate of 8% simple p.a. from the date of the final decision up to the date of settlement.

recommendation: As the amount produced by the calculation of fair compensation by Hazell Carr exceeds £100,000, I also recommend that The Analysts pays Mr F the balance. If The Analysts doesn't pay within 28 days of being notified of Mr F's acceptance of a final decision, I recommend also that interest is payable on that balance at the rate of 8% simple p.a. from the date of that decision up to the date of settlement.

If Mr F accepts my determination, the money award is binding on The Analysts, and it must pay Mr F promptly. My recommendation is not binding on The Analysts.

Further, it's unlikely that Mr F can accept my determination and go to court to ask for the balance of the compensation owing to him after the money award has been paid. Mr F may want to consider getting independent legal advice before deciding whether to accept this decision.

As an aside, I note that since I issued my provisional decision the FCA has published (in March 2017) its proposals for updating the methodology used to calculate the redress owed to consumers who were given unsuitable advice to transfer out of a defined benefit occupational pension scheme to a personal pension.

The outcome of the FCA's consultation is expected by Autumn 2017. The FCA has said it doesn't expect firms investigating complaints on this issue to settle complaints on a 'full and final' basis until the outcome of the consultation is known. But it suggests firms may wish to offer redress on an interim basis using the current methodology and then once the outcome of the consultation is known, if necessary recalculate whether further redress is required.

The proposed changes to the calculation of redress that the FCA is consulting on could result in significantly higher loss calculations in cases like this, or in some cases lower figures.

Whilst I note the FCA's proposals and comments, and having considered the position carefully, I'm satisfied that, in the particular circumstances of this case, it's fair and appropriate to award (and recommend) compensation based on the loss calculation completed by Hazell Carr.

In reaching that conclusion I'm mindful of the following:

- The age of this complaint and the fact that if the loss calculation had been completed at any time during the 14-years since Mr F originally complained, it would have been calculated using the methodology used by Hazell Carr, rather than on the basis that the FCA is consulting on and has yet to confirm.

- Mr M has indicated that it wouldn't be a straightforward matter for the Partnership to pay compensation – he has in fact said that he himself has *"negligible earning potential to pay, or replace, money paid in compensation"*. And so, whilst my recommendation is that the Partnership pay the balance of the loss calculation over £100,000 (a further £200,972.23), it's very unlikely that the Partnership will pay the recommended amount over and above £100,000.

- I consider it likely that the terms of the FCA's consultation mean that the amount of redress would increase, or in the unlikely event that it decreases, it wouldn't drop by two thirds to below £100,000 and so won't impact on the binding aspect of the award.

In those circumstances, I don't consider it would be appropriate to introduce further delay to this complaint and await the outcome of the FCA consultation. I consider it's both fair and reasonable to conclude the matter and to award compensation on the basis set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr F to accept or reject my decision before 25 September 2017.

Philip Miller
ombudsman

COPY OF PROVISIONAL DECISION

complaint

Mr F has complained about advice he received in 1989 from The Analysts. He considers that it was *"fundamentally bad advice"* to transfer the value of his preserved pension benefits from The Mars Pension Plan into a section 32 plan.

background

The Partnership known as The Analysts ceased to exist in 1997. The Analysts (Pensions & Investments) Ltd was registered with the regulator at that time. However, the individuals who were partners of the Partnership at the time the advice was given to Mr F remain jointly and severally liable for the claim he has made.

For clarity, I will refer to The Analysts as 'the Partnership' and The Analysts (Pensions & Investments) Ltd as 'the company'.

The circumstances of this case may be summarised as follows:

- Mr F was a member of The Mars Pension Plan between April 1975 and May 1989.
- His pension was preserved when he left that employment.
- The Mars Pension Plan projected a pension of £18,301 at age 60 on the assumption. that increases in line with inflation would be 5% p.a.
- He had also made additional voluntary contributions.
- In August 1989, the Partnership advised Mr F to transfer from The Mars Pension Plan to a section 32 plan with Norwich Union (now Aviva).
- That advice covered only the main scheme benefits and not the voluntary contributions.
- The Partnership recorded that Mr F had a conservative attitude to risk – with a rating of 2 on a scale of 1 to 5.
- It also recorded that Mr F had no specific retirement date planned.
- Mr F was then aged 40.
- In a letter to Mr F, the Partnership said:

  "These are based on the comparatively safe "with-profits" type of investment rather than the "unit-linked" method, which can be extremely volatile."

  …

  "Your deferred pension under the Mars scheme at age 60 is £18,301. Under the current rules and assuming inflation is at 5% per annum after the deferred pension comes into payment, the benefits would be augmented to £23,864 per annum at State Pension Age 65.

  This compares with … £32,300 at age 60, and with 3% per annum increases £37,445 at age 65. The total pension therefore over that five year period will amount to £74,322 and there will be approx. £13,581 extra per annum difference at age 65.

  I enclose the Illustration and Descriptive Literature … for your consideration. It is important to recognise that the figures illustrated do not represent the upper and lower limits of the possible amount of benefit. What is actually paid will depend upon the future investment performance … but I believe that you can expect them to perform well."

- The illustration showed a guaranteed fund value at age 60 of £122,493.
- It also showed a projected pension of £32,300 (based on a projected fund value of £389,000) if growth of 13% p.a. was achieved.
- And £12,300 p.a. (based on a projected fund value of £177,000) at growth of 8.5% p.a.
- Following the advice of the Partnership, Mr F transferred to the section 32 plan.

Mr F later remarried.

In 2002, he obtained a projection of his pension benefits. The projection led him to believe that he was likely to receive less from the section 32 plan that he would have received from The Mars Pension Plan had he not transferred. Mr F raised his complaint at that time.

A financial viability test carried out by the company (which the Partnership had by then become) following receipt of his complaint showed that growth of 8.53% p.a. was required to match the value of the benefits of The Mars Pension Plan. That rate compared favourably with the rate given by the regulator later as a reasonable growth assumption in 1989 of 12.2%, for use in the industry-wide pensions review. However, another test carried out by this Service indicated that growth of 10% -11% p.a. was required.

In the company's rejection of Mr F's complaint, it was noted that the pension projected by The Mars Pension Plan assumed that inflation would be at least 5% in each year to retirement. In fact, it had been much lower and this would have reduced the pension Mr F would have received had he not transferred.

Mr F took benefits from the section 32 plan in January 2009, after he'd reached age 60. His fund value was then £202,004.

When referring his complaint to this Service, Mr F said that although *"qualifications"* [warnings about risk] were given in 1989, the advice he had at the time gave him *"comfort"* and *"reassurance".*

The representative of one of the former partners, Mr M, raised objections to our Service looking into this complaint. An ombudsman, Mr Roberts, considered these objections and issued a jurisdiction decision on 16 December 2015, concluding that we could consider it. A copy of the jurisdiction decision was sent to the surviving partners of the Partnership from the time the advice was given, and to Mr F.

An adjudicator issued his view on the matter in January 2016. He thought that the complaint should be upheld. However, Mr M and his representative disagreed and also said that it hadn't had sufficient opportunity at that time to make arguments on the merits.

It was therefore agreed that the case would be referred to another adjudicator and additional time was afforded to the Partnership to make further representations on the merits of the case.

Mr M's representative said the following in response to the complaint:

- The Partnership was registered with FIMBRA. It acted in accordance with the rules and guidance issued by FIMBRA. Those rules included the recommendation of a specific investment if the adviser had good grounds for believing it to be suitable in light of the information provided by the client.

- The growth rates shown by the financial viability tests were below the maximum growth rates published by the regulator for the industry-wide pensions review.

- Mr F was aware that the benefits he would get from the section 32 plan weren't guaranteed. Mr F knew from the outset that there was some risk in relation to investment performance.

- He was guaranteed a fund at age 60 of £122,493 with the section 32 plan, with bonuses in addition.

- Mr F had other pension provision. In 2001, another financial adviser said that Mr F had:
  - a personal pension to which he was no longer making payments.
  - the section 32 plan.
  - the pension fund from the additional voluntary contributions paid to The Mars Pension Plan.

- Mr F had decided to keep the fund built up by additional voluntary contributions invested in a With-Profits fund, indicating that he was willing to accept the risk of doing so.

- He had a long period (20 to 25 years) in which to build up further pension benefits.

- In 1989, the benefits in The Mars Pension Plan were not secure because there was no 'lifeboat' scheme in place at that time. The eventual payment of Mr F's pension depended on the ability of his employer to continue to fund the pension scheme adequately and his benefits were not risk free.

- It wasn't possible to give a detailed comparison at the lower growth rate shown on the illustration from 1989. The Mars Pension Plan only stated the maximum benefits that Mr F could receive. The actual increases in the benefits from The Mars Pension Plan have been lower than projected in 1989.

- Inflation could have eroded the value of the benefits that Mr F could have received from The Mars Pension Plan.

- Mr F's second wife was substantially younger than him. This would have had a negative effect on any quotations he received that incorporated a widow's pension.

- Mr F received advice in 2001 from a new adviser. Mr F was then classed as a sophisticated and aware investor who sought an aggressive approach to the investment of his pension fund.

- The new adviser recommended that Mr F continue the section 32 plan. The representative considered this showed the new adviser believed the section 32 plan to have been suitable.

- This advice would have broken the chain of causation and ended Mr F's reliance on the advice given by the Partnership.

The new adjudicator then considered the matter afresh. He thought that Mr F's complaint should be upheld and sent his view to both parties in July 2016. His reasoning is set out below.

The adjudicator said that, although Mr F classed himself as a sophisticated and aware investor in 2001 when he met a new adviser, this wasn't the case in 1989. The adjudicator had seen no evidence of any significant investment experience at that time. And other than the benefit arising from the additional voluntary contributions Mr F had made, by 2001 Mr F had no other benefits remaining in The Mars Pension Plan.

The adjudicator acknowledged that there were risks associated with remaining in The Mars Pension Plan. Whilst the employer bore the risks of ensuring that the preserved pension would be paid, the pension income was reliant upon the employer being able to ensure the plan was adequately funded. There was no "statutory lifeboat" at that time. But the adjudicator also said that there was no reason to assume that The Mars Pension Plan wouldn't honour its commitments. And so he thought that the advice should have been based on Mr F's circumstances and objectives at the time, along with the assumption that Mr F would be paid the pension due from The Mars Pension Plan.

Whilst future growth rates in the section 32 plan and actual revaluation rates in The Mars Pension Plan couldn't be known, the Partnership should have recognised the degree of certainty which attached to the latter, the adjudicator commented. And that this made the benefits intrinsically valuable to a conservative investor.

The adjudicator noted that the voluntary contributions Mr F made were invested in a With-Profits fund. The Mars Pension Plan confirmed that there would have been a choice of funds when he started the contributions, but it couldn't confirm the extent of that choice. The adjudicator noted Mr M's representative's comment that this demonstrated that Mr F was comfortable with that type of fund and that it was compatible with his attitude to risk.

But the adjudicator disagreed. Whilst some investment in a With-Profits fund wouldn't; have been considered unsuitable in 1989 for a conservative investor, the actual amount of his pension provision he'd previously invested in this was relatively small. And this had no effect on the defined benefit available to him from the main scheme. The transfer of the entirety of the defined scheme benefit represented too much risk for a conservative investor such as Mr F, the adjudicator said.

The adjudicator also noted the company's comment that it had reviewed the advice given as if it had been part of the pension review. It said that the literature given to Mr F had been compliant. But the adjudicator set out the wording from the guidance. This said the following:

> 357 *The firm should examine the information on file, and any information obtained from the occupational scheme, from the provider (if this is not the firm) and, from any direct contact with the investor to ascertain whether the investor was misled by the firm.*
>
> 358 *For example, in connection with the salesperson's statements, the firm should be alert to evidence that:*

…

- *the salesperson suggested that projected personal pension benefits were guaranteed or certain;*
- *the salesperson put disproportionate emphasis on the higher of the two projections given under LAUTRO projection requirements;*

He also set out the Partnership's comments in its letter of 29 August 1989:

> "*It is important to recognise that the figures illustrated do not represent the upper and lower limits of the possible amount of benefit. What is actually paid will depend upon the future investment performance … but I believe that you can expect them to perform well."*

The adjudicator acknowledged that Mr F's attention had been drawn to the fact that the figures shown were not the upper or lower limits of what he might receive. The booklet it provided pointed out that the deferred pension will almost always be guaranteed at a higher level than the basic level guaranteed in the new policy. It also said that he could not be sure of the amount of his pension until it was payable and that the illustrations provided were 'notoriously unreliable' as a true indicator of what was eventually achieved. It was also acknowledged that Mr F had been aware that there was some investment risk.

But the adjudicator thought that the accompanying phrase used by the Partnership - *"you can expect them to perform well"* – and the use of figures derived only from the higher growth rate projections constituted "disproportionate emphasis" in terms of the pension review guidance.

The adjudicator also noted the representative's comment that it wouldn't have been possible to have given a detailed comparison at the lower growth rate shown on the illustration from 1989 as The Mars Pension Plan only stated the maximum benefits that Mr F could receive.

But whilst the adjudicator acknowledged that the actual plan increases had been lower that those projected in 1989, he didn't accept that this removed the Partnership's responsibility to give equal weight to the higher and lower growth projections.

The adjudicator also didn't think that a comparison with the lower projection would only have been appropriate if The Mars Pension Plan had shown the benefits that might be paid assuming a minimum level of revaluation. The final fund value achieved by the section 32 plan was dependent upon growth and not RPI, he said.

It was the adjudicator's view that, although risk warnings were given to Mr F by the Partnership at the time of its advice, the emphasis on the likelihood of the investments performing well, combined with the failure to draw Mr F's attention, fairly, to the lower of the growth rates, misled Mr F about the true nature of the risks involved. The adjudicator thought that this was likely to constitute a breach of the pension review guidelines for a compliant sale. He also thought that this would be a breach of FIMBRA rule 4.3.1, which required the Partnership to take all reasonable steps to ensure that Mr F understood the extent to which he would be exposed to risk.

Attention was then drawn to FIMBRA rule 4.4.4, which said that:

> *"…a member shall not recommend such a transaction nor arrange or effect such a transaction on behalf of a client … unless the member believes, having exercised reasonable care in forming its belief, that no transaction in any other such investment of which the member is or ought reasonably to be aware, and which would be available from the same or a different source, would be likely to secure the objectives of the client more advantageously than the transaction recommended, arranged or effected by the member;"*

It was the adjudicator's understanding that the Partnership suggested the only transactions to which 4.4.4 applied were those which would result in a transfer away from The Mars Pension Plan. But the adjudicator said that one of the options available to Mr F was to leave his benefits in The Mars Pension Plan. In the adjudicator's view, the test then became whether transferring was likely to secure Mr F's objectives more advantageously than would be the case if he didn't transfer.

Although Mr F might have received lower pension benefits because he transferred, this didn't of itself make the advice given by the Partnership unsuitable, the adjudicator said. Mr F knew from outset that his pension fund would be exposed to risk if he transferred and that the eventual pension benefits weren't guaranteed. Inflation could have taken a toll on both the benefits ultimately received from The Mars Pension Plan (if in excess of the 5% limit) and those from the section 32 plan.

But the adjudicator identified several risks associated with the transfer. Mr F took on the joint risks of poor investment performance *and* falling annuity rates. The adjudicator said that to justify the transfer, there needed to be a reasonable prospect that Mr F would be materially better off in retirement. There would be no advantage in transferring and accepting the risks involved simply to receive benefits of corresponding value.

The adjudicator referred back to FIMBRA rule 4.4.4. His interpretation of this was that if the Partnership hadn't taken reasonable steps in concluding that the transfer was the most advantageous means to secure Mr F's objectives, then it shouldn't have recommended the transfer. And in taking those reasonable steps, the Partnership needed to have considered the potential for investment growth.

Consideration was then given to Mr F's attitude to risk. He was recorded in 1989 as willing to accept risk with a rating of 2 on a scale of 1 to 5. In 2003, he said that he wanted *"very very little"* risk for his pension. But the adjudicator nevertheless acknowledged that it was important to assess this complaint in light of what Mr F told the Partnership in 1989. And this was that he had a "conservative" attitude to risk.

The adjudicator commented that the Financial Viability Test (FVT) undertaken for the company indicated that growth of 8.53% was required to match the benefits given up. However, he was of the view that this allowed for 'franking'. But he didn't think the available evidence supported the position that The Mars Pension Plan would have made that adjustment to the pension benefits. The adjudicator also said that 'franking' was prohibited under The Health and Social Security Act 1984. And so he didn't think the FVT had been done correctly.

The adjudicator noted that the illustration produced by Norwich Union in 1989 showed that the section 32 plan might provide an annuity of £12,300 if growth of 8.5% a year was achieved. But this would have been materially below the pension Mr F could have received from The Mars Pension Plan, despite the similarity in growth rates. This reinforced the adjudicator's opinion that the FVT hadn't been correct.

An FVT had been carried out by this Service as well. The adjudicator said that this indicated that growth of between 10% and 11% was required to provide benefits of comparable value. The illustration from 1989 showed an annuity of £32,300 p.a. if growth of 13% each year was achieved. The Mars Pension Plan was projecting a pension of £18,301 at 60, rising to £23,864 at 65. The adjudicator therefore considered a rate between 10% and 11% to be a better indicator of the growth required.

The adjudicator acknowledged that this required growth rate was below the maximum reasonable rate given by the regulator for use in the FVT - 12.2%. But he also thought the result indicated that the margin for Mr F to be better off in retirement, based on investment growth alone, was slim. But as the result of that FVT wasn't in any case known in 1989, the adjudicator noted that the growth rate required couldn't have been a factor in the advice given to Mr F. And it also didn't take into account Mr F's conservative attitude to risk.

The regulator hasn't given guidance on the growth that an adviser might reasonably expect, the adjudicator said. It's required advisers to reach their own opinion on growth, taking account of the individual consumer's circumstances. But it was noted that the regulator had told advisers, at the time in question, to use assumed growth rates of 8.5% and 13% when producing illustrations of future growth. But whilst the adjudicator didn't think it would have been inappropriate to use these growth rates as a starting point for assessing suitability, he said that the adviser would also need to consider the consumer's attitude to, and capacity for, risk.

Mr F's pension fund was guaranteed to grow to at least £122,493 within the section 32 plan, the adjudicator noted. And when Mr F took his pension benefits at age 60, the value of his pension fund was £202,004. The illustration produced by Norwich Union in 1989 showed a potential retirement fund of £389,000 assuming growth of 13% each year and a retirement fund of £177,000 at 8.5% a year. The adjudicator commented that actual growth had therefore been at the lower end of the projections.

The growth rate required for Mr Fs' section 32 plan benefits to simply *match* The Mars Pension Plan benefits was at the higher end of the regulator's permitted scale - i.e. much closer to13%. The adjudicator considered that this level of required growth would be consistent with an investor who had a balanced or more adventurous risk rating. But Mr F had been recorded as a conservative investor – and this would correspond with the lower expectation of growth (closer to 8.5%). And an assumed growth rate of 8.5% fell some way short of matching the scheme benefits.

The adjudicator said the Partnership was right to say that the required growth rate was below the maximum reasonable rate set out by the regulator for use in the FVT. But it was his view that a conservative investor shouldn't reasonably be advised to transfer his scheme benefits to a fund that required growth at the upper level of what was deemed achievable by the regulator to exceed the relinquished benefits. But his view was that is what had happened here.

Furthermore, investment growth was only part of the equation, the adjudicator continued. When the transfer took place, Mr F also became vulnerable to declining annuity rates. This risk was in addition to the investment risk linked to the section 32 plan itself.

The adjudicator thought it unlikely that the scheme booklet provided to this service was the same as that given to Mr F in 1989. But he thought it likely that a previous version would have contained similar wording. The adjudicator said that the booklet only talked about investment performance – it didn't mention annuity rates. So he didn't think Mr F would have been aware of the further risk which declining annuity rates could present to his transferred pension.

The adjudicator also acknowledged that Mr F's second wife was considerably younger than he is. This would have had a negative impact on any annuity rate that included provision for a widow's pension. But the adjudicator thought that this possibility ought in any case to have been taken into account by the Partnership when it gave its advice.

It was noted that when the advice was given, annuity rates were significantly higher than today. But the adjudicator was also of the view that rates were even then gradually declining and had been for several years as mortality rates improved. Given this trend of mortality rates, the adjudicator thought that a future reduction in annuity rates should have been reasonably foreseeable to the Partnership when it gave its advice. And that this reduction would have further eroded the margin for Mr F to be better off in retirement if he transferred.

The adjudicator also said that the guarantees associated with the benefits from The Mars Pension Plan wouldn't have had the same vulnerability to the possibility of Mr F remarrying someone younger. The possibility of a change in circumstances effectively enhanced the risks associated with the transfer, bearing in mind the need to purchase an annuity on retirement many years later. This was in the adjudicator's view an additional factor which ought to have been taken into account by the Partnership when it advised Mr F.

The adjudicator then addressed the length of service accrued by Mr F at the point of transferring. He noted that Mr F had been a member of The Mars Pension Plan for just over 14 years. In 1989, the fact find recorded that he had *"No retirement date planned (50 to 75?) flexible."* The adjudicator didn't think this suggested that Mr F wanted to retire early. Rather, he was satisfied that he wasn't planning in 1989 to retire at any particular age. The need to accommodate the mere possibility of early retirement wasn't in the adjudicator's opinion an objective, or even a prominent feature of the advice he sought at that time. But even if it had been, the adjudicator thought it would have been open to Mr F to then make a decision to transfer his benefits at the time any such decision was later made.

In terms of death benefits, the adjudicator noted that had Mr F died before taking benefits, The Mars Pension Plan would have paid a widow's pension that was 50% of his GMP element. Improving the death benefits could have been an objective for transferring, as Mr F was noted as liking *"the idea of 'Return of Fund' with no premium."* And the fact find referred to Mr F's pension helping to provide for his family in the event of his death.

It was noted that Mr F was, and he still is, taking medication for a particular condition. But the adjudicator didn't think there was any particular indication in the advice provided in 1989 that Mr F considered death benefits to be a prominent feature of the advice he sought. Nor did the adjudicator consider there to be evidence to suggest that Mr F was happy to take additional risk with his pension entitlements generally, in order to secure more advantageous death benefits for his spouse.

And so the adjudicator was unable to conclude that the potential death benefits - or the option to retire early - were significant features in Mr F's decision to transfer. It was also noted that this was consistent with what Mr F has since said to this service. In answer to the question: *Please explain how important to you benefits were on death before retirement;* Mr F had said "*Wanted to ensure family would be provided for*." Whilst the adjudicator thought that Mr F was confirming such benefits were an objective for him, his view was that this fell short of saying anything about the level of importance he attached to them. And it was also noted that Mr F had later said that, although he wanted his pension to provide for his family in the event of his death, he had placed no particular priority on the death benefits.

The adjudicator further noted that the company itself had seemingly accepted in earlier correspondence with this Service that death benefits and early retirement might not have been priorities for Mr F in 1989. The adjudicator cited the letter of 1 December 2005, in which the company accepted that death benefits and early retirement weren't priorities. The adjudicator considered this to be the reason why those issues hadn't been addressed in the Partnership's recommendations.

In summary, the adjudicator set out why he didn't consider the advice to transfer away from The Mars Pension Plan was the most advantageous means of achieving Mr F's objectives. He noted that he was 40 at the time of advice and could have expected to work for at least a further 19 complete years. After leaving employment in 1989, Mr F had taken out a personal pension, although he was no longer contributing to that personal pension by 2001. In the adjudicator's opinion, it would nevertheless have been reasonable to believe in 1989 that the benefits in The Mars Pension Plan would have been only part of Mr F's total pension provision.

But the adjudicator did note that, in 1989, Mr F wasn't in employment that offered membership of an occupational pension scheme. He thought it was possible that Mr F might be able to join such a scheme in the future. But the adjudicator thought the defined benefits Mr F had built up in The Mars Pension Plan should have been considered at the time as likely to constitute a significant part, if not all, of that type of benefit when he came to retire.

The adjudicator reiterated that the benefits in The Mars Pension Plan were relatively secure and could have formed a foundation on which Mr F could build by paying into a personal pension. He emphasised that the benefits from both the personal pension and the additional voluntary contributions would have been at risk of poor investment performance *and* declining annuity rates. In the adjudicator's view, it wasn't appropriate to expose Mr F's entire pension provision to those risks.

The adjudicator acknowledged the possibility that investment growth and annuity rates could have proved more advantageous, but his view was that the most prudent way of achieving Mr F's objectives would have been to maintain the reasonably certain foundation of the benefits in The Mars Pension Plan. He thought that the additional voluntary contributions and further provision through a personal pension would have allowed a degree of investment risk aimed at maximising growth.

Finally, the adjudicator addressed the advice Mr F received from another adviser in 2001. He considered what the Partnership had said about this breaking the chain of causation and ending Mr F's reliance on the advice given by the Partnership. But he noted that the adviser recommended that Mr F should leave the section 32 plan in place. He therefore didn't think that this advice ended Mr F's reliance on the advice he'd received from the Partnership.

The adjudicator continued by saying that advice to simply maintain the status quo didn't indicate that the subsequent adviser considered the transfer to be suitable and that in turn Mr F was reliant on that business' advice going forward. It was clear to the adjudicator that reinstatement to the scheme was no longer available to Mr F at that time. In the absence of that option, the Partnership hadn't indicated what steps it thought the subsequent adviser ought to have taken to redress the loss which had already been caused.

The adjudicator concluded that the subsequent advice didn't break the chain of causation. It was his view that the original advice given by the Partnership to transfer out of The Mars Pension Plan was still the effective cause of Mr F's loss.

Mr F agreed with the adjudicator and had nothing material to add. But Mr M didn't agree. He asked that I look again at whether this complaint was one that we could and should be considering. He said the following:

- He wasn't the partner who advised Mr F in 1989. And the actual partner has since died.
- The company did everything it could to adhere to the requirements of the pension review. But Mr F had moved house without letting it know.
- The company covered the complaint as it had committed to complete the pension review. But ultimately the company lacked the financial means to pay compensation.
- Physical access to the files has been an issue and this has been going on for many years.
- Other lengthy delays have been incurred by this service and Mr F himself. These have further prejudiced the ability to explain the actions of a now deceased partner.
- The advice was given 27 years ago and the Partnership was disbanded almost 20 years ago.
- When the advice was given, the 'long stop' limitation period was 15 years.
- The partner who had advised Mr F died five years ago and can no longer give evidence.
- Mr M and his wife have negligible earnings potential to pay or to replace any compensation awarded to Mr F.
- This Service hasn't approached the deceased partner's executors or estate.

Mr M also said that his rights under Article 6 of the European Convention on Human Rights had been breached. He said that this was in light of:

- The length of time since the advice having been ignored when looking at what's fair and reasonable in all the circumstance of this case.

- The longstop limitation period when the advice was given was 15 years.

- The partner who gave the advice has died and the Partnership was disbanded nearly 20 years ago.

- The ombudsman's findings in the original determination that it was the company which gave the advice – and not the Partnership – which the adjudicator's opinion now contradicted.

- The time it has taken to resolve the complaint.

- The inappropriate and unfair approach of the previous adjudicator.

- The extreme prejudice which Mr M, as a pensioner, was suffering as a result of having to deal with the matter.

Mr M also commented on the merits of the complaint and submitted additional information relating to The Mars Pension Plan. I believe these points may be summarised as follows:

- Mr F initially approached the Partnership in 1989, having left his employment. It was explained to him that there were two possible policies through which to exercise his "right to transfer" out; a section 32 plan or a personal pension policy. The latter precisely met Mr F's requirement to take pension benefits between 50 and 75, but it wasn't possible at that stage to transfer directly into a personal pension due to the contracted out nature of the scheme.

- Mr F could have waited for ten years to then directly transfer into a personal pension, but by doing so would have lost out due to inflation, as The Mars Pension Plan quoted a maximum deferred pension at normal pension age.

- Any significant rise in RPI, combined with the cap of revaluation at 5% p.a., would have impacted on the value of the scheme benefits. RPI rates in excess of 20%, as had been experienced by other recent scheme leavers, would have had a dramatic impact.

- On the other hand, any significant reduction in RPI in the years up to Mr F's retirement would have reduced the scheme benefits payable. This in fact happened and reduced Mr F's benefit entitlement by about a third from the maximum amount quoted in 1989.

- The With-Profits fund into which Mr F invested suited his investment profile of "conservative (low risk)". The guaranteed roll up of 5.75% p.a. immediately increased the retirement fund to £122,493 from the transfer value of £41,662.

- Mr F had been advised to *"consider transferring into a Section 32 policy. At some later date, if it is in your best interests to do so, a switch into a Personal Pension can be arranged."* There were several occasions when Mr F should have considered such a switch; when he was issued with an invitation to have his pension transfer reviewed (albeit this went to an old address); when he met with his new adviser in 2001; when he'd investigated the possibility of early retirement with Norwich Union in

2002 (although he didn't actually retire early); and when the section 32 policy matured in 2008.

- If Mr F had switched out of his section 32 policy at maturity, he could have entered into income drawdown with a maximum income of £15,600 p.a. This was in excess of the benefits he'd receive from The Mars Pension Plan. Had Mr F followed the recommendations from 1989, the advice would have achieved its aims. It was enquired as to whether Mr F had in fact followed the advice by switching into a personal pension plan.

- The Mars Pension Plan hadn't quoted a pension entitlement upon leaving service. Rather it had quoted a maximum deferred annuity at normal pension age. If RPI had been less than 5% p.a., the entitlement would have been lower. No-one therefore knew what Mr F's scheme entitlement would have been if he hadn't transferred. However, Mr M was confident that it would have been lower than £13,577.

- Mr F held a personal pension policy which had been "paid up" in 2000. He would therefore have been aware of the possibilities and flexibilities offered by this type of contract – including phased retirement and drawdown. Mr F's pension arrangements were reviewed at this point by a new adviser, who could have explored such possibilities.

- Mr F complained in 2002 that the value of his pension was lower than it would have been if he hadn't transferred. But it was enquired as to what level of pension Mr F was referring, given the drop in actual RPI over the intervening years.

- The guaranteed "annual roll-up" in the section 32 policy was 5.75% p.a., as confirmed by the increase of the policy value from £41,662 to £122,493. And by 2005, bonuses had also been added totalling more than £61,000.

- The Mars Pension Plan set out a maximum deferred benefit which was calculated using RPI of 5%. Norwich Union, LAUTRO and FIMBRA suggested that the higher rate illustrations were compatible with RPI rates of 5% or 6%.

- It would therefore have been misleading to use the lower projected figure from the illustration without referring to the lowest pension Mr F could receive if he didn't transfer. And that would have been the pension at date of leaving, which wasn't given by The Mars Pension Plan. Mr F was strongly advised to read the illustration and would have seen both the lower and higher projections.

- The Mars Pension Plan didn't offer early retirement, except in severe cases of ill health. It was known that Mr F developed no serious medical conditions before he reached 60 and so couldn't have taken early retirement. Mr F had wished to have the flexibility to take his benefits at any time between 50 and 75. He didn't want to be tied to taking them at age 60. Mr M also said that these would have started in part at age 60.

- Mr F would only have had a choice over the investment of his voluntary contributions around 2000. This was long after Mr F had left his previous employer.

- It wasn't the case that longevity alone would negatively impact on future annuity rates, without taking account of investment yields, interest rates and RPI. The adviser was in fact well aware of all of these factors, including the government's intention to reduce RPI. This would have had a detrimental effect on the revaluation of the scheme benefits.

- In 1979, RPI was reducing and investment returns – along with annuity rates – were following suit. As a conservative investor, Mr F should have balanced the risks of dropping yields and annuity rates with reducing RPI. The adviser was well aware of these.

- The adviser did his best to balance the risk of relying on the higher yield section 32 plan illustration with the risk of relying on the maximum possible deferred pension quoted by The Mars Pension Plan.

- Mr F's objectives had been recorded as being able to take his pension benefits at any time between 50 and 75. But the OPS benefits would only have been available from age 60 (in part) and then the remainder at 65. The right to take benefits from a personal pension at any point between 50 and 75 did however fulfil this objective.

- The Partnership couldn't have predicted the later impact on the bonuses paid by With–Profits funds from factors such as demutualisation costs. Whilst initial growth on the section 32 plan was healthy, this declined to approximately 1% p.a. compound between 2002 and 2008.

- It wasn't possible to determine whether Mr F had suffered a loss until it was known what level of pension The Mars Pension Plan would have paid from age 60. It also couldn't be known as to what loss (if any) could be attributable to the Partnership's advice until it was known whether Mr F had followed the advice to later switch into a personal pension arrangement.

The adjudicator acknowledged Mr M's points, but said that they hadn't persuaded him to change his view. He said the following in summary:

- Mr F had preserved benefits in 1989 which were required, by law, to be increased to his normal retirement date – and in the case of the Guaranteed Minimum Pension derived of the scheme's contracted out status – to age 65.

- It was wrong to say that the scheme benefits wouldn't have increased – or that his pension would in fact have decreased. The preserved pension and the legally required increases would have given Mr F a relatively certain return.

- The Partnership hadn't advised Mr F to transfer into a personal pension arrangement, but rather the section 32 policy.

- The benefits comparison wasn't balanced as it only referred to possible future figures using the higher growth rate. A balanced comparison would have made specific mention of the figures at the lower growth rate.

- It wasn't reasonable to expect Mr F to calculate the value of the benefits being given up on transfer.

Mr M submitted additional comments in response:

- The Mars Pension Plan didn't give a figure for Mr F's preserved pension as at the date he left that scheme. It calculated his pension in three separate parts to reflect changes in the normal retirement age for men from 65 to 63 and later to 60. Each part was calculated at the relevant normal retirement age and then two parts were adjusted to allow for retirement at age 60. The Mars Pension Plan didn't calculate Mr F's pension as at the date of leaving but rather projected the pension to normal retirement age and would have reduced its commitment when the rate of inflation was less than 5%.

- In 1989, the rate of inflation was a concern. But the preserved pension only allowed for a maximum of 5%. The figure quoted by The Mars Pension Plan of £18,301 p.a. assumed that inflation would be exactly 5% each year. If inflation in any one year was more than 5%, the real value of Mr F's preserved pension would fall. And if inflation was less than 5%, Mr F's pension from The Mars Pension Plan would have been lower. The possibility that inflation would be higher or lower than 5% was a risk to Mr F's preserved pension.

- In the company's letter of 17 March 2003 Mr F was told that, as inflation had been less than 5%, his maximum pension had fallen from £18,301 to £13,577. Mr F was then 55. The Partnership said that the maximum pension at age 60 would probably be lower if low inflation continued.

- The Mars Pension Plan closed in 2003. It was wrong to assume that in 1989 there was no risk to the pension built up by Mr F had he not transferred. It also couldn't have been foreseen that Mr F would re-marry a much younger wife.

- No-one knew the actual figure for Mr F's preserved pension at the date of leaving service. The only figure provided by the scheme was the maximum deferred benefit at age 60. There could be no increases to that figure as this already assumed maximum revaluation.

- The Partnership had recommended a section 32 plan initially because the regulations about transferring from schemes such as The Mars Pension Plan with the GMP commitment prohibited transfers into personal pensions. There were sound reasons for recommending a section 32 plan initially, with the option of switching to a personal pension if greater flexibility was required.

- The provider of the section 32 plan had, in 1989, declared a bonus of 14%, which Mr M said was in addition to the guaranteed growth of 5.75% written into the policy – to provide the guaranteed fund value at age 60 of £122,493. This bonus rate was in excess of the higher growth rate on the illustration and the rates later identified by the financial viability tests.

- Mr F appears to have been able to calculate what his loss was. He said that he was facing a pension that was only 56.3% of what he would otherwise have had. But it wasn't clear how Mr F had arrived at that figure.

- Mr M would incur considerable expense in establishing the pension that Mr F could have received and in arranging for loss calculations to be carried out. If he carried out the calculation, Mr M asked whether Mr F would be reimbursing him for these and other costs incurred.

- Two firms of actuaries, when trying to calculate the pension that Mr F had built up as at the date he left The Mars Pension Plan, had identified issues and inconsistencies with the figures given by that plan.
- The loss calculation carried out previously had been on a 'prospective loss' basis, being before Mr F had reached the normal retirement age of The Mars Pension Plan. Any loss calculation now would be on an 'actual loss' basis as Mr F was now beyond normal retirement age.

my provisional findings

At the outset, I should say that I echo the comments made by the ombudsman deciding jurisdiction in this case, Mr Roberts, relating to the time taken to resolve this matter. And my sincere apologies extend to both parties in that regard. It's extremely unfortunate that it's taken the time it has, but I'm confident that all parties are aware of the particular set of circumstances which have contributed to the delays.

Mr M has asked that I revisit the question of whether Mr F's complaint is one that we could or should consider. In doing so, he correctly states that the question of jurisdiction remains open until my determination of this complaint.

In light of that, I've carefully reviewed the comments made by the ombudsman Mr Roberts in his jurisdiction decision of 16 December 2015. I agree with what Mr Roberts has said in his decision and am satisfied that on the basis of the evidence and issues raised by the parties and considered by him at that time, he has correctly decided that this Service has jurisdiction to consider Mr F's complaint.

Since then, and particularly in response to the adjudicator's assessment, Mr M has largely repeated his concerns about fairness issues and has again made comments in connection with undue delay; article 6 of the Human Rights Act and the long stop provision in the Limitation Act. I cannot see that he has raised a new jurisdiction issue, nor has he raised new evidence pertaining to a jurisdiction issue that was decided by Mr Roberts.

I acknowledge the points he makes about the advising partner in this case now being deceased. But I do not agree that that is an issue that goes to jurisdiction. The correct respondent in this case is the former authorised firm known as The Analysts. Any award that I may make will be against that Partnership. I am not required, as a matter of jurisdiction, to give notice of the complaint to each partner who may be potentially liable to meet that award. In the interests of fairness and due process, this Service has given Mr M and the other surviving partner, Mr N, the opportunity to reply to the complaint. I don't agree that in order to seize jurisdiction, I am required to give notice to the estate of a partner who died five years ago.

All in all, the other points Mr M makes about fairness, delay, the Human Rights Act and the longstop provision are not matters that affect my jurisdiction to consider this complaint. But I agree with Mr M that they are relevant to my consideration of the fair and reasonable outcome in this dispute.

I note that the adjudicator looked at these issues before setting out his assessment of the merits of the complaint. The adjudicator said the following in summary:

- This Service is required to take into account, amongst other things, the relevant law and regulations and the determination the former ombudsman scheme might have been expected to reach.

- The relevant former ombudsman scheme, the PIA Ombudsman Bureau, would have been bound to follow the provisions of the Limitation Act 1980.

- He was aware of the longstop provision in the Limitation Act 1980, which provides that actions for negligence cannot be brought more than 15 years after the date of the act in question.

- The complaint was likely to cause Mr M considerable stress, bearing in mind his age and current circumstances.

- The death of the partner who gave the advice will have made it impossible now to obtain any recollections he might have had of the sale.

But the adjudicator also said the following:

- A pension is a long term product.

- Mr F first referred his complaint about the transfer advice in 2002, and so that was in any case within 15 years of the date of the advice.

- Since that time, Mr F has rigorously pursued his complaint, has spent a good deal of time in his attempts to obtain compensation and has not caused any undue delays at any stage.

- There is a large amount of reliable evidence available on which a fair assessment of the complaint can be made, including a significant amount of evidence from the time of the advice.

- Mr F had waited a considerable period of time for the resolution of his complaint and for whom significant prejudice would be caused if this Service decided to dismiss or reject his complaint merely because of the long passage of time.

I agree with these comments. And so whilst I understand Mr M's position and acknowledge that Mr F's complaint has likely caused him considerable distress, I'm satisfied that Mr F's complaint is one that we can and should look at, irrespective of the long period of time since that complaint was first raised.

In saying that, I disagree with Mr M when he suggests that Mr F has in any manner contributed to the delays in question by taking two years (after the determination of his complaint against the company) to refer his complaint against the Partnership. In the period immediately after his first complaint was determined, and at significant personal cost, Mr F acted promptly in his efforts to enforce the award that was made against the company. That he was unable to do so was in no way his fault. All in all, I'm satisfied that Mr F has acted appropriately throughout the consideration of his complaint.

As to the specific comments Mr M makes about the approach of the first adjudicator in this complaint being 'inappropriate' and 'unfair', I'm satisfied that no prejudice has been caused to Mr M as a result of the manner in which that assessment was made. I'm satisfied that Mr

M was able to submit his points in response to the assessment – and indeed did. On the basis of the submissions made, the case was referred to another adjudicator who then issued a further independent view on the matter afresh. There can therefore be no doubt that the Partnership has had a fair opportunity to put forward its arguments – as well as to reply to the arguments made by Mr F in response.

As to the comments Mr M makes about the application of the longstop provision from the Limitation Act, I agree with the adjudicator that I'm required to take account of the fact that the former ombudsman scheme would have been bound to follow the provisions of the Limitation Act, including the longstop provision that bars claims made more than 15 years from the negligent act or omission. But as the adjudicator says, Mr F did refer his initial complaint within that 15 year period. I acknowledge that this complaint is distinct from that complaint, and has come some years after that initial referral, but for all the reasons outlined above, I don't consider that it would be fair and reasonable to impose the 15 year longstop in this case. Unlike the former ombudsman scheme, I'm not bound to do so. And as outlined above, I consider that Mr F has acted diligently and appropriately throughout the prosecution of his complaint. In all the circumstances, I consider it wouldn't be fair and reasonable to dismiss his complaint for being referred outside that longstop period.

I have of course given very careful thought to everything Mr M says about a potential breach of article 6 of the Human Rights Act arising from the long delay in considering this complaint. As I say, I don't dismiss the very significant distress this complaint will have caused Mr M and his wife and I acknowledge that such distress will be exacerbated in light of their respective ages.

But, Mr F is still awaiting a resolution of his complaint. And I'm satisfied that on the basis of the evidence available, particularly the significant amount of written evidence that was contemporaneous to the advice and transfer itself, that a fair resolution of that complaint can be achieved.

So all in all, I agree with the adjudicator on these points. Whilst the delays incurred in resolving this matter are regrettable, I consider there would be disproportionate harshness and unfairness caused to Mr F if I were to dismiss his complaint in response to those delays. In my view, and in line with what the adjudicator has said, the fairest approach seems to be to now take all reasonable steps to resolve this dispute as quickly as possible.
I turn now to the points that more particularly relate to the suitability of the Partnership's advice to Mr F to transfer his Mars Pension Plan benefits to a section 32 plan. In doing so, I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I'm of the view that Mr F's complaint should succeed. I consider the adjudicator's findings set out above to be compelling. I've carefully considered the business' comprehensive comments in reply to those findings, but on balance my view is that Mr F's complaint should succeed.

The effect of revaluation on the preserved benefits in the scheme

Mr M has made much of the point that the revaluation of Mr F's preserved pension in The Mars Pension Plan was linked to RPI, with a cap of 5%. He says that as a result, any reduction in RPI would have reduced the benefits payable and any significant increase in RPI would have eroded the benefits payable because of the cap. He indicates that in light of those possibilities, the With-Profits fund recommended to Mr F was more suitable for a conservative (low risk) investor.

I accept, of course, that the revaluation of the preserved benefits in the scheme would necessarily have affected the level of benefit ultimately paid to Mr F at retirement. In the event, Mr M is correct to point out that Mr F's entitlement to a maximum deferred pension of £18,301.97 per annum payable at age 60 (applying the 5% cap) under the scheme was reduced to £13,577 as a result of a drop in RPI in years since he left service. As a result, Mr M suggests the section 32 plan would have offered Mr F greater flexibility and a greater opportunity to provide benefits exceeding The Mars Pension Plan.

But I think this argument belies the whole point of the revaluation process. It's accepted that the occupational scheme gave Mr F a guaranteed preserved benefit that was based on his years of service and salary at leaving. The intention of the revaluation process was to link Mr F's benefit with RPI, in order to ensure that Mr F's real purchasing power was keeping track with inflation. The guarantees secured by way of Mr F's pensionable service and salary at leaving would have been enhanced appropriately on a yearly basis so that that purchasing power was preserved

And it's also worth noting that the actual revaluation, albeit lower than the sustained 5% each year assumed by the deferred benefit statement, still would have produced a pension higher than the projection at the lower growth rate in 1989.

Mr M has said that the real purchasing power of the benefits from The Mars Pension Plan would be eroded by inflation of more than 5%. That is equally possible, but it doesn't follow that the section 32 plan was likely to provide benefits that exceeded those of The Mars Pension Plan because inflation was high. High inflation would simply have meant that the level of growth required to match inflation – and so the real purchasing power - would also need to have been proportionately higher. And a high inflation rate doesn't automatically mean there'd be an environment of high growth rates.

It's also worth noting that Mr M has made reference to RPI rates in excess of 20% for recent leavers of the scheme. But this had last been the case in 1975. Whilst RPI rates had undeniably been higher (and lower) than 5% since that time, in the five years preceding the transfer, RPI had ranged between 3.4% and 6.1%. And Mr M has himself noted that the government of the day was committed to keeping control of inflation.

All in all, I don't agree that the effect of the revaluation process was to render the section 32 plan more suitable for a conservative investor like Mr F. The Mars Pension Plan offered Mr F a guaranteed benefit based on his final salary and years of service. This preserved benefit would have been increased each year in line with inflation. There was a small risk that sustained periods of very high inflation would effectively erode the value of that pension because of the 5% cap on revaluation. But there was at the same time a very real risk that investment rates would not grow during such a period at a rate required to match that level of inflation – and so there could be no reasonable assurance that the section 32 plan would work better for Mr F during such periods in any event.

Essentially, in my view the risks to Mr F's pension entitlement remained considerably higher with the section 32 plan that they would have been under The Mars Pension Plan. The Mars Pension Plan offered Mr F the relative security of a guaranteed preserved pension adjusted in line with inflation. But the section 32 plan linked the value of his pension entitlements with investment growth *and* associated annuity rates, which in my view didn't render it more suitable for a conservative investor like Mr F.

The use of only the higher level of growth in comparative illustrations

Mr M has also pointed to the fact that the value of the actual preserved pension (without the effect of revaluation up to the normal retirement age) wasn't set out in the deferred benefit statement. He says that the only figure available was the maximum deferred benefit payable at 60. In turn, he says that it would therefore have been misleading to use the lower projected figure from the section 32 illustration without referring to the lowest pension Mr F could receive if he didn't transfer (the actual preserved pension).

Whilst I've given careful thought to the point Mr M makes, I don't agree with him that the absence of a figure for the value of the actual preserved pension income at the date of leaving The Mars Pension Plan was justification for the focus on only the higher level of growth of the section 32 plan in comparative illustrations.

According to FIMBRA, and as outlined by the adjudicator, the essential rules for giving suitable investment advice included rule 4.3 – *understanding of risk.* That rule stated:

4.3 Understanding of Risk

4.3.1 …a member shall not recommend to a client a transaction in an investment or arrange or effect such a transaction with or for a client … unless, before the recommendation is made or the transaction is effected, the member has taken all reasonable steps to satisfy itself that the client understands the extent to which he will be exposed to risk or further liability by entering into the transaction.

In my view, it's intrinsic in this requirement that a client should be fully and reasonably informed of the fact that his pension benefits with the section 32 plan would be affected by fluctuations in investment growth.

But in its letter of 29 August 1989, the Partnership gave special emphasis to the illustration demonstrating the possible performance of the section 32 plan at the *upper* projected growth rate only. Whilst I agree that the letter did also warn Mr F that the figures shown didn't represent the upper and lower limits of the possible amount of benefit - that warning would carry little weight when the lower limits were not in fact shown in the advice letter itself.

I accept that the projections at lower limits were outlined in an enclosed illustration, but in my view that advice letter would have carried significant weight for Mr F when making his decision whether or not to transfer his pension. I consider that in order to take all reasonable steps to inform Mr F of the risk of transferring to the section 32 plan, the Partnership should not have placed disproportionate emphasis on the higher of the two projections – and should not have added the comment "*I believe you can expect them to perform well*". As the adjudicator pointed out, this over emphasis on high rates of investment performance was regarded by FIMBRA and the PIA in its pension review guidance as a specific indicator of misleading information giving rise to a compliance breach.

So whilst I agree with Mr M that The Mars Pension Plan's deferred benefit statement effectively outlined the *maximum* amount payable to Mr F at age 60 only, that didn't mean that it was entitled to emphasise only the upper projection of investment growth for the section 32 plan in the advice letter. Irrespective of the growth figures indicated for The Mars Pension Plan, a person couldn't reasonably understand the extent to which he would be exposed to risk with the section 32 plan if he was not fairly told about the lower as well as the upper projected growths.

In saying that, I note that Mr M has said that FIMBRA and LAUTRO regarded the higher illustration rate to be compatible with 5% RPI revaluation rates, but I've seen no evidence of when or where that statement was made by the regulators – or that this in any case meant that emphasis should be placed only on that upper figure. On the contrary, I've seen clear evidence in the pension review guidance itself that FIMBRA regarded an over emphasis on the higher projected figure from the alternative pension arrangement as an indicator of misleading information suggesting a non-compliant sale.

I've also noted that in outlining the higher projection figures only in the advice letter to Mr F, the Partnership said that (my emphasis) "t*he total pension therefore over that five year period* ***will amount*** *to £74,322 and there* ***will be*** *approx. £13,581 extra per annum difference at age 65."* In my view the language used describes future benefits from the section 32 in an overly assured manner. It suggests a certainty about the projected personal pension benefits that I consider to be misleading. The use of this type of language was also highlighted by the regulator in its Pension Review guidance as an indicator of a compliance breach.

For completeness I'll repeat the pension review wording:

> *357 The firm should examine the information on file, and any information obtained from the occupational scheme, from the provider (if this is not the firm) and, from any direct contact with the investor to ascertain whether the investor was misled by the firm.*
>
> *358 For example, in connection with the salesperson's statements, the firm should be alert to evidence that:*
>
> - *the salesperson suggested that projected personal pension benefits were guaranteed or certain;*
> - *the salesperson put disproportionate emphasis on the higher of the two projections given under LAUTRO projection requirements;*

In view of my comments above, I consider that the advice failed in both of these respects.

All in all, I agree with the adjudicator. It's my view that the Partnership should have included in its advice letter a comparison of both the high and low figures from the section 32 illustration with the projected maximum pension quoted by The Mars Pension Plan. In failing to do so, and because it couched the upper growth figures in language that suggested some certainty about its attainment as well as an assurance that the adviser expected them to perform well, the Partnership has failed to take all reasonable steps to satisfy itself that Mr F understood the extent to which he would be exposed to risk by entering into the transaction and has given him misleading information.

In any event, it seems to me that if the Partnership felt it couldn't fairly give an outline of the section 32 projections at the lower rate, without also giving an indicator of The Mars Pension Plan preserved benefits at a lower value (say if RPI had been less than 5%), it could always have approached Mars to ask for such figures. To my mind, the failure to include section 32 projections at the lower rates in the advice letter is not excused merely by the fact that the benefits statement didn't give the Partnership the information it says it needed to make a fair comparison. I've seen no evidence to indicate the Partnership approached Mars for such figures, nor have I seen any evidence that Mars couldn't have given such figures if it had been asked. So, even if I felt such figures were necessary to inform Mr F of the risks involved in the transaction, it appears the Partnership has unreasonably failed to obtain those figures in any event.

The benefits available with the section 32 plan

Mr M has said that the guaranteed retirement fund value meant that the section 32 provider was committed to giving a return on the transfer value of around 5.75% a year. He also said that the provider of the section 32 plan had declared a bonus of 14% in 1989. In turn, he suggests that the section 32 plan was in fact a suitable pension vehicle for an investor like Mr F with a conservative approach to risk.

But as set out in the adjudicator's findings, even if this was the case for that particular year, a level of growth close to this would have needed to be sustained, year on year, to just match the scheme benefits. And for the transfer to be deemed suitable in terms of growth prospects, there had to be a reasonable expectation that the scheme benefits would be bettered. It's also worth noting that the maximum projected growth rate at the time was 13% p.a. This would indicate that a bonus rate of 14% wasn't deemed to be sustainable at that time.

And as with the adjudicator, consideration must also be given to the level of risk which Mr F was prepared to take. In order to achieve year on year returns which are at the upper level of the growth projections – which they would need to have been to just *match* the scheme benefits - my view is that Mr F, as a conservative (low risk) investor, would have needed to take a higher level of risk than he was suited to.

The impact of falling annuity rates

As outlined by the adjudicator, it's important also to bear in mind that growth on the transfer value was only one factor which would ultimately determine the benefits that Mr F would receive from the section 32 plan. Because he transferred, Mr F was exposed to the combined risks of poor investment growth and falling annuities rates.

On that particular issue, Mr M has said that longevity wouldn't have been the only factor in predicting falling annuity rates in the future and that other aspects such as investment yields, interest rates and RPI would have had an impact. This is of course true, but all other things being equal (and there was no reason to believe that any of these aspects would become increasingly favourable on a sustained basis), I consider that the general trend in longevity – and indeed actual data on annuity rates available at the time – meant that a future reduction in annuity rates and the additional impact this would have on a pension income would have been reasonably foreseeable.

By contrast, within The Mars Pension Plan Mr F's retirement income was already "locked in" by virtue of his known salary and pensionable service. This in turn made his Mars Pension

Plan benefits more certain and indicates to me that it was better suited to a conservative (low risk) investor.

The potential to switch to a personal pension and take income drawdown

Mr M has said that the Partnership recommended a transfer to a section 32 plan because a transfer directly into a personal pension was prohibited. He indicates there were sound reasons for proceeding in that manner, with the option for switching to a personal pension 10 years down the track. He suggests Mr F might have mitigated his loss if he had either switched to a personal pension at a later date, or taken income drawdown.

My first point here would be that taking income drawdown would, in my experience, be inherently more risky than taking an annuity, which would provide a guaranteed income. To exceed the income that the same pot would have secured through an annuity, investors have to take risks with their pension income. The remaining pot after any income withdrawal remains invested and so is liable to fluctuation in line with market movements. And in order to meet the necessary critical yields to sustain the level of income required, income drawdown involves investment in risk based assets – typically a mix of equities, property and bonds. And these risks would have been present throughout the period of drawdown.

And so it's worth repeating that Mr F was a "conservative (low risk)" investor – in general terms, the risks typically associated with income drawdown wouldn't be suitable for low risk investors. I don't think it's reasonable to suggest that in order to try to match the lost scheme benefits, Mr F should then have taken on additional risks which would potentially endure throughout his retirement. In my view, these are not steps he would be reasonably required to take in mitigation of a loss as I can't see that such steps would need to be taken by an investor in the ordinary course of business.

I've also taken account of Mr M's point that the adviser's initial recommendation contemplated that Mr F could transfer his section 32 plan to a personal pension at a subsequent date. Mr M suggests that Mr F had a reasonable opportunity to do so and seems to suggest he could have mitigated his loss if he'd done so.

But although a later transfer into a personal pension plan would have been possible, I don't agree that Mr F's failure to do so was an unreasonable failure to mitigate his loss, nor that it has broken the chain of causation emanating from the Partnership's advice, if that is what Mr M is suggesting.

In considering this point, it's worth noting at the outset that the Partnership *didn't* in fact advise Mr F to transfer into a personal pension in ten years' time when the prohibition no longer applied. It said that:

> *"At some later date, if it is in your best interests to do so, a switch into a Personal Pension can be arranged."*

So it is clear that a future switch into a personal pension was an option which was contemplated by the adviser when he gave his advice. However, it was equally clear that such an option was merely contemplated as a possibility and that it would only be viable if it was in Mr F's 'best interests to do so'.

As we know, Mr F did in fact seek further professional advice about his pension arrangements in 2001. That adviser simply recommended Mr F should leave the section 32 plan in place. There was no advice given to switch to a personal pension. I agree with the adjudicator on this point. I don't see that this advice, nor the apparent 'failure' to switch to a personal pension, can reasonably be said to have ended Mr F's reliance on the advice given by the Partnership. I don't agree that Mr F has acted at all unreasonably in failing to elect to switch his section 32 plan, or to take any course of action in relation to the plan that couldn't fairly be regarded as action that would be taken in the ordinary course of business by a person in his position.

I've seen no evidence that a switch to a personal pension would have been an ordinary or reasonable step to take, nor even that it would necessarily have reduced the losses Mr F now faces with his pension benefits.

All in all, I agree with the adjudicator that it wouldn't be fair or reasonable to expect Mr F to take the steps that Mr M suggests he ought to have taken. I remain of the view that it was the original advice by the Partnership that was the effective cause of Mr F's loss.

The possibility of taking early retirement

Mr M has also commented on Mr F's need for flexibility for early retirement and has said that this type of flexibility wasn't available with The Mars Pension Plan but would have been provided by his section 32 plan or a personal pension arrangement. But the Partnership recorded, in 1989, that Mr F had no planned retirement date. I don't think the available evidence indicates that the prospect of early retirement was particularly imperative to Mr F at that time. In my view, if Mr F had been reasonably informed of the risks associated with the section 32 plan, it would have been most unlikely that he would have elected to proceed with the transfer, in order merely to facilitate the possibility of retiring early. Further, I'm mindful that Mr F was only 40 years old at the time of the advice. To my mind, more suitable advice would have been for him to wait until the date of early retirement was imminent in order to take steps to enable that process.

Other risks with The Mars Pension Plan

Finally, Mr M suggests that this service has failed to give due regard to the risks faced by Mr F in remaining with The Mars Pension Plan. I've recognised and considered the risk arising from inflation (above). But I also recognise that there would have been a risk to Mr F's preserved pension in the event of the failure of The Mars Pension Plan to meets its commitment to him. But the mere fact that some occupational pension schemes had failed before1989 didn't mean that there was a reasonable prospect that The Mars Pension Plan would have failed. I've not seen any evidence to indicate that there was any likelihood of this, such that his would reasonably have formed a compelling reason to transfer. So I don't agree that in this particular instance the absence of a statutory lifeboat for failed schemes was a reasonable factor indicating the advice to transfer was suitable.

The foreseeability of Mr F remarrying

Mr M has said that this service has wrongly indicated that the Partnership should have foreseen the possibility of him remarrying a woman who was significantly younger. I've considered what the adjudicator's said on this point, and I agree with his view that the Partnership ought to have recognised that Mr F was still a long way from retirement. It was in turn foreseeable that his circumstances might change considerably before he retired and, specifically, before he had to purchase his annuity.

It's not unforeseeable, for instance, that Mr F's marital status might change before that time, and that the cost of that annuity might be affected by that change (as happened in this case). This, again, is another reason why the Partnership ought to have given more weight to the guarantees offered to Mr F by The Mars Pension Plan. The spousal and widow's benefits, for instance, were certain and secure and wouldn't have been affected by a change in circumstance such as a change in the age of a new spouse before retirement. This again is another factor suggesting the transfer, in these circumstances, was not the most advantageous pension advice for Mr F.

summary

All in all, I don't consider the advice given to Mr F to transfer away from The Mars Pension Plan was the most advantageous means of achieving his objectives. He was a conservative (low risk) investor. On the evidence I've seen, the Partnership failed to take all reasonable steps to satisfy itself that Mr F understood the extent to which he'd be exposed to risk by transferring his pension. I agree with the adjudicator that the best advice would have been for Mr F to remain in The Mars Pension Plan.

I'm further satisfied that, were it not for the Partnership's advice, Mr F would have remained in The Mars Pension Plan until his retirement.

provisional decision

My provisional decision is that I uphold the complaint. In recognition of the comments of both parties on the matter of calculating loss, this service has asked an independent firm of actuaries, Hazell Carr, to calculate whether Mr F has suffered a loss.

It's determined that Mr F has suffered a loss of £300,972.23 by transferring away from The Mars Pension Plan.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £100,000 (for cases referred to us before January 2012), plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £100,000, I may recommend that the business pays the balance.

provisional determination and award: My provisional decision is that I uphold the complaint and require The Analysts to pay Mr F £100,000.

If The Analysts doesn't pay within 28 days of being notified of Mr F's acceptance of a final decision, interest will be payable at the rate of 8% simple p.a. from the date of a final decision up to the date of settlement.

recommendation: As the amount produced by the calculation of fair compensation exceeds £100,000, I also provisionally recommend that The Analysts pays Mr F the balance. If The Analysts doesn't pay within 28 days of being notified of Mr F's acceptance of a final decision, interest will be payable on that balance at the rate of 8% simple p.a. from the date of that decision up to the date of settlement.

This recommendation isn't part of my provisional determination or award. It wouldn't bind The Analysts. It's unlikely that Mr F can accept my decision and go to court to ask for the balance. If the outcome of the case remains the same in a final decision, Mr F may want to consider getting independent legal advice before deciding whether to accept that decision.

Philip Miller
ombudsman