IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/GA/150/98/AS

In the complaint between:

ANN KNEESHAW Complainant

and

FINE WOOL PRODUCTS PENSION FUND First Respondent
THE ROMATEX PENSION FUND Second Respondent

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956

Introduction

This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A (3) of the Pension Funds Act of 1956.

The complainant is Mrs Ann Kneeshaw, the widow of Mr G R Kneeshaw, an erstwhile member of the respondent and an erstwhile employee of Fine Wool Products (Veldspun International, Veldspun (Pty) Ltd) deceased on 16 March 1993.

The first respondent is the Fine Wool Products Pension fund, a pension fund duly registered in terms of the Pension Funds Act of 1956 and of which Mr G R Kneeshaw was a member.

The second respondent is the Romatex Pension Fund in its capacity as Manager and Administrator of the Fine Wool Products Pension Fund of which Mr Kneeshaw was a member. The respondent is a pension fund duly registered in terms of the Pension Funds Act of 1956.

The complaint relates to the administration of the fund and the interpretation and

application of its rules and alleges that the complainant sustained prejudice in consequence of the maladministration of the fund. More specifically the complainant alleges that the respondent should have continued to pay her a pension after the death of her husband, because he was led to believe that he was entitled to a joint life pension which would ensure that the complainant would continue to receive a pension should her husband pre-decease her.

No hearing was held in this matter, but a report was placed before me by investigator, Antonia Simmons. Accordingly, in determining this matter I have relied on the documents and report placed before me and the exchange of correspondence. Having completed my investigation I have determined this complaint as follows and for the reasons set out herein.

Background

Mr Kneeshaw was employed by Fine Wool Products as the Johannesburg Branch Manager from 1 May 1960 until he retired in March 1989. Mr Kneeshaw was at all times a member of the Find Wool Product ("FWP") Pension Fund.

All members of the FWP Pension Fund were given the option with effect from 1 November 1973 to become members of the Feltex Pension Fund, which fund later became known and Romatex Pension Fund. Circulars were distributed reflecting the difference between the two funds and members were requested to make an election. Mr Kneeshaw elected to stay with the FWP Pension Fund. Such members as had elected to remain with the FWP Pension Fund were again given the option in 1982 to change to the Romatex Pension Fund benefits and conditions with effect from 1 August 1982. Once again a circular was distributed setting out the implications of the two options. Mr Kneeshaw again elected to retain the FWP benefits. Although the FWP Pension Fund was managed by the Romatex Pension Fund, the rules of the FWP Pension Fund remained applicable to such members as had not elected to move to the Romatex Pension Fund.

The relevant rules of the FWP Pension Fund which were, therefore, applicable to Mr Kneeshaw on his retirement were as follows:

ARTICLE 8 - PENSION BENEFITS

8.4 Joint-life pensions

Notwithstanding anything to the contrary contained in Articles 8.1, 8.2 and 8.3, a member may stipulate that the pension which is payable to him in terms of these rules be altered to a joint-life pension payable to himself and a nominated dependant while both he and the dependant are alive and after the first death, to the survivor for his lifetime. If the pension is bought from the Insurer the member must at least one year before retirement, give written notice through the Board of Trustees to the Insurer of his intention to exercise this option, failing which notice, such option can only be exercised on such conditions as the Insurer may determine. The pension available on retirement in accordance with Article 8.1 will be reduced in accordance with the joint-life pension rates then available with the relevant insurer. If a member has selected a joint pension, he can not rescind such selection without the relative insurer's written consent.

8.5 Payment of pensions

Pensions purchased from the Insurer shall be subject to the following provisions:

8.5.2 All pensions shall be payable during the life time of the pensioner, provided that if the pensioner dies within five years of the date of first payment, the pension payments shall nevertheless continue until payment for 5 years in all shall have been made, subject to Articles 8.5.3 and 8.7.

8.5.3 A joint-life pension shall cease at the death of the survivor.

8.6. Commutation of benefits at retirement

As at a member's retirement date the Board of Trustees shall, at the request of a member and with the consent of the employer, pay the member one-third of the cost, as at his retirement date, of the pension to which he is entitled in terms of these Rules or any lesser part of such cost. If this option is exercised the pensions referred to in these Rules will be reduced accordingly.

8.7 Alternative Pension Guarantee Periods

At the request of a member the Trustees may arrange for the pension to be guaranteed for periods longer than five years. If such option is exercised, the pension described in Articles 8.1, 8.2, 8.3 and 8.4 will be reduced in accordance with annuity rates then available from the relative Insurer. Pensions bought from the Insurer can be guaranteed for ten or fifteen years instead of five years, but notice to exercise any of these options must be given in writing through the Board of Trustees to the Insurer at least one year before the options are exercised, failing which notice such options will only be granted on such conditions as the Insurer may determine. Once any one of these options has been selected it can not be rescinded without the Insurer's written consent.

Mr Kneeshaw was to retire early in 1989 and he made various enquiries regarding the pension benefit to which he would be entitled. He was supplied with a full set of FWP rules prior to his having made his election of options available to him (and possibly as early as 27 June 1987 when it is alleged that a copy was forwarded to him although no documentary evidence of a precise date has been furnished). It is not claimed by the complainant or any of her representatives that Mr Kneeshaw had not obtained a copy of the rules.

Besides being in possession of the rules of the fund various oral discussions are alleged to have taken place between Mr Kneeshaw and the fund's actuaries, Ginsburg, Malan and Carsons, relating to his pension benefits. Proof of these discussions have not or cannot be provided and therefore remain hearsay, reference having been made to them but not substantiated in letters from Romatex Limited and the respondent to representatives of the complainant. Mr Kneeshaw did direct a letter to the general manager of his employer on 7

December 1988 making various enquiries regarding his pension benefits. A response to Mr Kneeshaw's letter in the form of an internal memorandum from the group personnel manager to Mr J Pretorius of the employer dated 8 February 1989 addressed most of the queries addressed raised by Mr Kneeshaw in his letter of 7 December 1988. *Inter alia* this memorandum stated the following:

> ...3. Mr Kneeshaw has the following options:
>
> He can take a normal pension of R27,644.40 per annum or he can opt for a lump sum payment of R89,107 with a reduced pension of R18,429.60. If however he wants his wife to receive a pension in the event of his death then he should opt for a reduced pension of R15,145.68 pa. Instead of R18,429.60. In the event of the death of either spouse the surviving spouse would receive two-thirds of R15,145.68.

I have been placed in possession of a further memorandum dated 14 February 1989 which was directed to Mr Kneeshaw by the aforesaid Mr Pretorius and which made available to Mr Kneeshaw a copy of the memorandum from the group personnel officer referred to above.

On 14 February 1989, therefore, and before he made his election of retirement options available to him Mr Kneeshaw was at least in possession of the FWP fund rules as well as the internal memorandum detailing his options and including the quantum available in respect of each of the three options. In addition it is possible that various oral explanations had been given to Mr Kneeshaw although the precise content of such oral explanations is not known.

However, a letter dated 5 December 1988 from J A Carson and Partners, consulting actuaries to the manager of respondent, details only two options and makes no reference to the third option of a joint life pension. It is not known whether Mr Kneeshaw ever had sight of this letter.

In a subsequent letter dated 6 February 1989, J A Carson once again addressed the manager of the respondent, this time including reference and calculations relating to the option of a joint pension. Once again it is unclear whether Mr Kneeshaw ever had sight of this letter or was informed of its contents. Chronologically the next written communications were the memoranda referred to above, but these were superceded by a letter from the Romatex Pension and Provident funds to Mr Kneeshaw dated 16 February 1989. It is to be noted that this was the only formal written communication between the fund and Mr Kneeshaw. This letter read as follows:

> We confirm your retirement from the Company on the 28th February 1989, and your benefits are as follows:
>
> 1) A pension of R27,644.0 per annum (R2,303.70 per month).
> 2) A lump sum of R89,107.00 and a reduced pension of R18,428.60 per annum (R1,535.80 per month).
>
> The undermentioned are required by us:
>
> A) A copy of the first page of your identity book.
> B) A copy of the first page of your wife's identity book.
> C) A copy of your marriage certificate.
> D) To have the name and address, as well as the account number of the bank or building society to which we may transfer your monthly pension.
> E) To have the enclosed IRP2 completed.
>
> Arrangement will be made for you and your wife to remain on medical aid.
>
> Please advise us as to which option you have decided to elect.

Only two options were mentioned in this letter and Mr Kneeshaw was requested to notify

the fund which option he intended to elect. There is no mention of the reduced pension of R15,148.68 which would have allowed for a spouses pension after his death. In a letter from Mr Kneeshaw to the Romatex Pension and Provident fund dated 24 February and referring specifically to the letter from the fund dated 16 February 1989, Mr Kneeshaw specified *inter alia* that:

> I elect to take the lump sum and the reduced pension of R18,428.60, which is R1,535.80 per month.

Together with this letter Mr Kneeshaw enclosed copies of the first pages of his and his wife's ID Books and a copy of their marriage certificate.

On 9 March 1989 Carsons and Partners addressed a further letter to the Romatex Pension Fund listing all three options and supplying relevant calculations. Clearly as a result of this information respondent addressed Mr Kneeshaw notifying him of the quantum in respect of the first two options only. Both letters were, however, written after Mr Kneeshaw had already made his election of option and apparently related to precise quantum only.

Mr Kneeshaw duly retired in March 1989 and was paid benefits in terms of his choice of option. On 16 March 1993, Mr Kneeshaw died. Since this date was within the five year guaranteed period for receipt of pension payments as stipulated in terms of rule 8.5.2 quoted above, the pension was paid to the complainant until the end of that period being March 1994.

The complainant took issue with respondent's allegation that pension benefits would only be paid until March 1994 as she had at all times been under the impression that pension benefits would be paid to her even after the death of her husband, should he die before her. There were various communications between attorneys Roode, Van Der Merwe , Du Toit, acting for complainant and respondent. The matter was not resolved to the satisfaction of the complainant. The respondent took the view that payments had been

made in accordance with the rules and the option chosen by Mr Kneeshaw and that the trustees had no discretion to pay any additional benefit to the widow.

Eventually in an attempt to finalise the matter the respondent on 19 July 1994 sent a letter to Mr Malcolm Creamer, a chartered accountant who had approached the respondent on behalf of the complainant in an attempt to resolve the issue, suggesting that the matter be arbitrated. The FWP fund rules made no provision for the resolution of disputes but by virtue of a FWP fund trustees resolution the management of the FWP fund was made subject to the rules of the Romatex fund in terms of which disputes could be referred to the fund auditor for final decisions.

Respondent suggested that in order to expedite the matter both parties should prepare a submission reflecting their respective positions for the auditor's consideration and that such submissions should be exchanged between the parties prior to handing them to the auditor for final submission. Respondent also stated that the parties would have to agree to be bound by the auditor's ruling. A submission on behalf of the complainant was prepared by MC Creamer and Company and one for respondent by Mr Pictor, Group Human Resources manager. The submissions were sent to Ernest and Young for arbitration and on 7 September 1994 the final decision of the auditor was made known to the effect that Mr Kneeshaw had been adequately informed regarding his pension benefits, had made an election which did not include any pension to his wife in the event of his death and that therefore the respondent was not liable to pay any benefits to Mrs Kneeshaw .

After further requests for investigations the matter was raised at a trustee meeting of the respondent on 2 August 1995. The trustees agreed that the late Mr Kneeshaw had been paid his benefit and that any further payment to the complainant would constitute a double payment and they were therefore not prepared to do this.

Argument

The essence of the complainant's case is that her husband was under the impression that he had made a choice which would cater for his wife in the event of his predeceasing her. In order to substantiate this argument the complainant seeks to illustrate her husband's state of mind at the time of making his choice and before. Mrs Kneeshaw's husband had at all times told her that he had made provision for pension benefits which would ensure that she would be adequately catered for should she be left alone. The allegation is that Mr Kneeshaw was not properly or adequately informed of his options by the fund at the time he made his choice. In support of this contention the complainant refers to the letter from the fund dated 16 February 1989 in which only two options were indicated and in response to which Mr Kneeshaw made his election. Both the complainant and her husband were under the impression that Mr Kneeshaw had opted for the joint pension.

It was further argued on complainant's behalf before the arbitrator, that the fund must have made allowance for sufficient quantum for Mr Kneeshaw to have chosen the joint pension option and therefore the fund would suffer no loss if they were to place the complainant in the position that she would have been in had her husband in fact chosen the option which she was under the impression he had chosen.

The respondent, however, contends that Mr Kneeshaw had been supplied with adequate information for him to have been able to make an informed choice, including the rules of the fund and the internal memorandum which specifically detailed all three options and included calculations and figures. Mr Kneeshaw therefore made his choice when in possession of all necessary details and as such he and his wife were bound by it.

The respondent further accepts the decision of its trustees at a meeting held on 2 August 1995 that Mr Kneeshaw had been paid his benefit and that any further benefit to Mrs Kneeshaw would constitute a double payment. The employer was not prepared to fund any *ex gratia* payment.

The respondent also by implication contends that the matter was finally determined by arbitration and cannot be adjudicated upon again.

Determination

The respondent suggests that my jurisdiction to hear this matter has been ousted by the arbitration clause in rule 7. The definition of "arbitration agreement" as provided for in the Arbitration Act 47 of 1965 is:

> A written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein.

The relevant rule reads as follows:

1. If any dispute arises between a member or former member or any person deriving a claim from a member and a fund, the matter shall be referred to the auditor.

2. In deciding any question of fact, the trustees or the auditor may act on such evidence that they or he may decide, whether amounting to legal proof or not.

It is not possible to establish that this rule implies that disputes are to be referred to arbitration in accordance with the Arbitration Act. I do not find that the rule amounts to formal arbitration clause. The rule merely indicates that in the event of disputes the fund auditor shall be approached.

Since the rule cannot be held to be a formal arbitration clause section 28 of the Arbitration Act does not apply. Section 28 provides :

> ...an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.

There does not appear to be any indication that the rule envisages this method of dispute resolution as being final and/or ousting the jurisdiction of a tribunal such as this or the courts.

However, on 19 July 1994 Mr Pictor, on behalf of the respondent, addressed a letter to Mr Creamer suggesting that both parties prepare submissions for consideration by the auditor and that the parties should agree to be bound by the auditor's ruling. Although this purports to be an arbitration agreement there is no evidence of agreement having been reached. Mrs Kneeshaw has moreover stated that she was not aware of any arbitration agreement. In the absence of any clear proof of a written agreement there can be no arbitration agreement as defined in the Arbitration Act. The special plea of arbitration, therefore, cannot apply.

A further point relating to my jurisdiction in this matter which has not been raised by either party is the fact that the complaint arose more than 3 years before the formal complaint was lodged with my office. In terms of the laws of prescription this matter would have prescribed and the complainant would therefore not be in a position to obtain relief against the respondent. However, in terms of Section 30I of the Pension Funds Act I am given the power on good cause shown or of my own motion to extend the period prescribed within which the complaint should be lodged. In this instance I shall exercise my discretion to extend the period and to assume jurisdiction accordingly. The effects of the decision of the trustees has been substantial in that Mrs Kneeshaw has at a late stage of her life been required to attempt to survive without any means. The complainant in fact initiated her queries relating to her predicament as soon as she established that she had been placed in such predicament. She made every effort to pursue what she believe to be her rightful claim to pension benefits. Under the circumstances I deem it fair and reasonable to investigate the surrounding circumstances fully.

It would appear that there is no dispute as to the fact that the incorrect option was chosen, but rather a dispute as to what option Mr Kneeshaw was under the impression he had chosen and as to whether the respondent was in any way culpable for his having made the incorrect choice.

The issue for determination in this matter is, therefore, whether the respondent did or did not provide adequate, appropriate information to the complainant's husband. The complainant's entitlement to adequate information is based essentially on the duties of the board of management of a pension fund which are codified in sections 7C and D of the Pension Funds Act of 1956. In terms of section 7C(2)(a) and (b) the board is obliged to take all reasonable steps to ensure that interests of members in terms of rules of the fund and the provisions of the Act are protected at all times and further to act in due care diligence and good faith. Section 7D(1)(c) includes among the duties of the board that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund. Additionally, section 7C(2)(b) and (d) require the board of the fund in pursuing its object to act with due care, diligence, good faith and with impartiality in respect of members and beneficiaries.

Although these provisions strictly speaking were not in operation at the time that Mr Kneeshaw made his choice they do point to the appropriate and applicable standard of reasonableness.

I have referred in previous determinations to the case of *Lorentz vs Tek Corporation* 1998 (1) SA 192 (W) where the High Court held that the pension fund trustees are obliged to conduct the affairs of the pension fund in accordance with the common law regarding the fiduciary duties of those who occupy positions of trust in the wide sense.

In other areas of administrative and employment law, the courts have consistently held that the duty to act in good faith incorporated the duty to disclose adequate and relevant information. This is particularly so when an individual faces a decision which may have adverse implications for him.

In the spirit of ensuring adequate disclosure the Registrar has issued PF Circular No. 86 which details disclosure requirements to be observed by funds. Inter alia funds are required to provide to members a statement of the benefits that become payable at the

time of retirement, death, disability and ill health, early retirement and withdrawal.

In this particular instance, Mr Kneeshaw had certainly fulfilled any obligation upon him to enquire from the fund details relating to his pension benefits. He had made clear to the fund that he was not certain of the options available to him and that he did not understand these and he accordingly directed a letter enumerating such enquiries to the relevant party. In response to his various enquiries, Mr Kneeshaw was in fact informed by the fund of the position in which he found himself. The fund supplied Mr Kneeshaw with a copy of the rules. Being supplied with a copy of the rules is not in itself sufficient to comply with the fiduciary duties upon the trustees. The rules are often difficult for members to understand and/or cannot be related to the real financial consequences of the choice of option. The respondent, however, supplied Mr Kneeshaw with details relating to all three options available to him, and moreover supplied him with precise detail relating to the amounts which would be due to him in respect of each of the three options in the internal memorandum referred to above. It was, therefore, possible for Mr Kneeshaw to relate his options chosen directly to an amount in financial terms which had been supplied by the respondent.

Mr Kneeshaw, moreover, in making his election specifically quoted one of the amounts of which he had been notified thus making it clear which option he had chosen. It is true that this written election was made in response to the letter from the respondent which did not enumerate all three options, but Mr Kneeshaw had been given details of all three options prior to this letter and was at least in a position to query the contents thereof.

Mr Kneeshaw was dealt with on an individual basis by respondent. Under the circumstances I cannot find that the respondent could possibly have done more than they did to assist Mr Kneeshaw in establishing the full details and import of his choice of option. It is most regrettable that Mr Kneeshaw appears to have misunderstood the nature of the option that he chose. To require the respondent to have done more than they did in this instance would be to place an excessively high burden upon funds which would be almost

impossible to discharge. Mr Kneeshaw's mistake has, regrettably, caused financial hardship, but I cannot find that the respondent is responsible for this.

The complaint is accordingly dismissed.

DATED at CAPE TOWN this 6th day of July 1999.

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John Murphy
Pension Funds Adjudicator