

Ombudsman's Determination

Applicant	Mr L
Scheme	Alsford Page & Gems Limited Pension and Life Assurance Scheme (the Scheme)
Respondent	Clerical Medical

Complaint Summary

Mr L has complained that Clerical Medical has unfairly removed the option for members to make additional contributions or transfers into the Scheme that benefit from guaranteed annuity rates (**GARs**).

Additionally, he has said that Clerical Medical has not invested the contributions into deferred annuities as is required by the investment contract which the Trustees have with it. Without Clerical Medical undertaking a loss assessment, it is unclear whether the correct approach to the investment contract would have been financially beneficial to members.

Summary of the Ombudsman's Determination and reasons

Mr L's complaints are not upheld as Clerical Medical is operating the Contract in accordance with the Memorandum, as agreed by the Trustees.

Detailed Determination

Material facts

1. The Scheme was established as an occupational pension scheme providing member benefits on a final salary basis by a Trust Deed dated 30 October 1984. Alsford Page and Gems Ltd (**APG**) was the principal employer to the Scheme.
2. Mr L is both a Member and a Trustee of the Scheme.
3. Clerical Medical was the Scheme administrator and is the investment manager.
4. Wilson Edwards LLP acts as professional adviser to the Trustees. Wilson Edwards is also representing Mr L in making this complaint.
5. The Trustees invested the contributions made to the Scheme through a Group Pension Contract (**the Contract**) with Clerical Medical. Of relevance to the complaint are the following provisions:

“payment of interest

5.-(1) The Society shall pay interest at the rate determined by the method stated in sub-condition (2) below on each premium received by the Society from the date of such receipt to the date that the annuity purchased by each such premium under condition 6 hereof is entered upon converted or surrendered...

Rate of interest (2) The annual rate of interest payable on premiums received by the Society shall be 87 pence percent less than the gross yield earned by the Society on its long term insurance business fund...

deferred annuities for members

6.-(1) The premiums received by the Society shall subject to sub-condition (10) below be applied to purchase in respect of each member a deferred annuity equal to the member’s pension to be entered upon and be payable in accordance with and subject to sub conditions (2)(a) (4) and (6) below. Provided that the amount of deferred annuity purchased by each £100 of premiums received by the Society shall not be less than that stated in the table of guaranteed annuity rates set out in the Appendix hereto.”

6. In 1996, Halifax Building Society bought Clerical Medical. The purchase and transfer of assets was sanctioned by Court Order.
7. Under the terms of the purchase and transfer of assets, Group Pension Contracts such as the Contract were classed as Deposit Administration Contracts and given the following description:

“Schedule I

Deposit Administration Contracts

The Deposit Administration Contracts are all contracts written by the Society before the Effective Date under which policyholder benefits are determined by the accumulation of premiums paid (after charges if appropriate) at a rate of interest determined by the insurer from time to time, under the following descriptions.”

8. Following the transfer of assets such contracts would be invested on the basis of the following:
 - “Schedule V
 - CMIG’s funds
 - 3. Attribution of policies
 - 3.1 On and from the Effective Date the following shall be attributed to and included in the With Profit Sub-Fund:
 - (a) Transferred With Profit Policies that are Traditional With Profit Policies, Deposit Administration Contracts...”
9. The result of this was that the Scheme’s assets and future contributions were invested into the With Profit Sub-Fund.
10. On 30 April 2008, the Scheme was closed to future accrual.
11. In August 2010, Wilson Edwards emailed the Scheme actuary on behalf of the Trustees and queried how the money was invested, saying:
 - “you said that deferred annuities are not purchased (as is provided for by the Investment Contract) we have been asked to seek clarification/confirmation from you so as to avoid any ambiguities in future.”
12. On 25 January 2011, Clerical Medical began discussions with APG about the possible conversion of the Scheme from a defined benefit (**DB**) arrangement to a defined contribution (**DC**) arrangement.
13. On 12 May 2011, Mr L was appointed as a Trustee by way of a Deed of Appointment.
14. On 24 May 2011, as part of the discussions surrounding the conversion of the Scheme, Clerical Medical agreed that additional contributions to the Scheme would be allowed after the conversion, and these contributions could benefit from the GARs offered. However, the contributions eligible to access the GARs would be capped at the level of the funding deficit at the date of conversion.
15. In November 2011, with APG under financial pressure and the Scheme in deficit, the Scheme was converted with the consent of its members from a DB to DC scheme through a Deed of Amendment. Following the conversion, the Scheme’s funds were split between the members and earmarked individually. These individually earmarked funds would then be used to purchase retirement benefits.

16. Following the conversion, the Contract was renegotiated between the Trustees and Clerical Medical.
17. On 10 February 2012, during the course of the negotiations, Clerical Medical stated:-

“The new clause 11 [within the proposed memorandum] has been added purely for the avoidance of doubt. The contract has in practice always operated on this basis but we thought that given that the scheme will be operating on a money purchase (*sic*) the position should be made absolutely clear.”
18. The negotiations culminated in a memorandum (**the Memorandum**) amending the Contract and dated 13 March 2013. This was signed by the Trustees and Mr L was a signatory.
19. The effect of the Memorandum was to cap the amount of ongoing contributions and transfers into the Scheme that could benefit from the GARs, as discussed between APG and Clerical Medical in advance of the conversion. The cap was set at the level of the Scheme deficit at the point of conversion. The Memorandum included the following relevant provisions:

“6. In condition 1 (construction of this Contract) the following definitions are added in alphabetical order:

“Cap” means the deficit of the Scheme as at the Conversion Date, calculated by the Scheme’s actuary and agreed with Clerical Medical”; and

““Conversion date” means the effective date of the deed of amendment of the Rules dated 10th November 2011”

7. The following is added as a new condition 10:

“Any premiums as defined in condition 4(1) of the contract paid after the Conversion Date shall:

Be limited to the amount of the Cap

Shall exclude contributions for and in respect of any member who joins the Scheme after the Conversion Date.”

8. The following is added as a new condition 11:

“The Scheme’s administration (currently provided by Clerical Medical) shall be provided by the Grantees with effect from the Conversion Date but Clerical Medical shall remain responsible to:

(a) provide statements of income and outgo but excluding revenue accounts and balance sheets,

(b) provide the information necessary to enable the Grantees to comply with their duties to disclose information to members including (but not limited to)

their duty to provide an annual benefit statement and their duty to provide information about members' options...

Notwithstanding any reference to deferred annuities in condition 6 or elsewhere in the Contract, any premiums already or to be received by Clerical Medical will not be used to purchase deferred annuities as detailed in condition 6(1). Instead premiums will be held on deposit by Clerical Medical until such time as the Grantees instruct Clerical Medical to use such premiums as are necessary to provide annuities or other benefits for and in respect of members as detailed in the rest of condition 6. The Guaranteed annuity rates referred to in condition 6(1) will continue to apply to annuities purchased by the premiums as defined in condition 4(1) and restricted by Condition 10."

20. Over the following years, several complaints were made about Clerical Medical's handling of the Scheme. During this Clerical Medical issued a final response letter which referred Mr L to the Financial Ombudsman Service (**FOS**), and I understand he raised a complaint with that service in May 2013. I understand that on referring the matter to the FOS the investigation was put on hold while further information was sought. In April 2015, the FOS indicated that the complaint would be better dealt with by The Pensions Advisory Service or The Pensions Ombudsman's Office (**TPO's Office**). The matter was referred to us in November 2015.
21. Over the same period, a complaint was pursued through the Institute of Actuaries (**IoA**) against actuaries involved with the Scheme, with a view to obtaining evidence to support Mr L's complaints.
22. When the matter was referred to TPO's Office in November 2015 six heads of complaint were considered under jurisdiction. Of the six, the two summarised above were accepted for investigation on the basis that Mr L was complaining as a beneficiary. Our jurisdictional time limits were waived because it was considered reasonable to exercise discretion because of the referral to the FOS and the concurrent complaint with the IoA.

Summary of Mr L's position

23. In summary, Mr L says:-

- Clerical Medical has stated that the funds have never been invested in accordance with the Contract. Mr L refers to comments made by the former Scheme Actuary which he summarises as:

““everyone”! (meaning, presumably everyone who worked in the Final Salary Department of Clerical Medical) knew that the scheme funds were not invested in accordance with the Investment Contract.”

- Clause 11 of the Memorandum shows, through the use of “instead”, that the approach to investment was altered away from the necessity to purchase deferred annuities as Mr L suggests was required, to a deposit arrangement.

- The natural interpretation of Condition 5(1) is that the contributions should be invested as per Clause 5, and accrue interest, until a deferred annuity, as set out in Condition 6, is purchased.
- This allows for the deferred annuity to be purchased at the end of the policy year or when contributions had accumulated to reach a minimum purchase price, avoiding the need for monthly data exercises, while still accruing interest.
- There is no reason to infer that the annuity should not be purchased until the member's retirement. That would be an immediate annuity, not a deferred annuity.
- The deferred annuities purchased need not represent the member's benefit needs at the same time or the same year. The words "equal to the member's pension to be entered upon" can be the amount of pension bought by that payment as opposed to the member's total entitlement.
- As a member's pension will accrue based on the salary at that time, it is not necessary to know or anticipate the total benefit at retirement. Each year's contributions will "secure a certain amount of pension until the total is reached."
- The minimum annuity rates referred to in the Contract can be applied to the deferred annuity, providing a guaranteed minimum deferred annuity rate, when in fact the actual pension provided by the deferred annuity from time to time could be much higher depending on annuity/interest rates and the age of the member at the point the deferred annuity was entered upon.
- The Contract can be read on a natural interpretation without inferences required. The meaning is clear, deferred annuities, not immediate [at retirement] annuities are to be bought. There is no reason to interpret the Contract in an alternative way.
- It might be argued that this interpretation could result in the value of the deferred annuities exceeding the member's entitlement, but the Contract allows the annuities to be surrendered and the excess used for other members.
- It appears that the legal advice received by Clerical Medical on this question was incompetent or worse. The summary of the legal advice provided to TPO states that "Counsel highlighted... continued to be credited with interest up to retirement." But that is not what the Contract states. The Contract states:

"The Society shall pay interest.... On each premium received by the Society from the date of such receipt to the date that the annuity purchased by each such premium under condition 6 hereof is entered upon."
- The interest is therefore not credited until retirement, but instead is credited until a deferred annuity is bought under Condition 6. Therefore, Counsel's opinion has

either been misrepresented or Counsel has misunderstood the Contract or the instructions they received. This could be described as fraudulent.

- The Contract “is not inconsistent with a benefit structure based on conventional deferred annuities.”
- The misrepresentation of Counsel’s opinion is a breach of the FCA’s (**Financial Conduct Authority**) code of conduct for complaints and the general requirement that Clerical Medical is “fair, clear & not misleading”. For Clerical Medical to have taken such a risk indicates the stakes are high in this case, and it appears to have “hoodwinked” TPO.
- The summary of the legal advice was written by a solicitor, and it said, “The advice [Counsel’s]... confirmed”, not stated or opined. The solicitor meant exactly what they wrote, and therefore Counsel was providing advice they were “employed to give, as opposed to anything to the contrary, and the advice required will have been made clear in the instructions or in some other way.”
- If there are ambiguities in the Contract, it should be interpreted in favour of the party that did not draft it. But there are no ambiguities other than what Counsel has apparently said. This could be resolved by Clerical Medical sharing the opinion, but it has opted not to because it “has something to hide”. This is inconsistent with the FCA’s rules on being open and transparent.
- The Contract can be straightforwardly interpreted if pre-conceptions given weight by support from Leading Counsel are shed. Leading Counsel’s interpretation requires a radical change to the whole investment basis, whereas Mr L’s interpretation requires no changes, and if it does [which is not accepted], it is a small change which should be accepted before Clerical Medical’s radical interpretation is accepted.
- Clerical Medical’s interpretation requires selectively ignoring parts of the Contract whereas this is not necessary under Mr L’s interpretation.
- Clerical Medical has referred to the 2008 Court judgment to distract from their “weak/non existent” arguments. The judgment does not mention Non Profit Contracts i.e. Deferred Annuities, because it would mean Non Profit Contracts were “subsumed into contracts with quite different investment risk/reward attributes.”
- If the 2008 judgment was relevant, Clerical Medical should have been required to inform the policyholders of the drastic change, but it did not. Regardless, the greater part, if not nearly all contributions were made prior to 2008.
- If the intention was not to purchase deferred annuities, then:
 - Why refer to “deferred” at all in Condition 6 (1)?

- Condition 6 (2) refers to unattached annuities and under “construction of this contract” unattached annuities are referred to as deferred annuities. This indicates that deferred annuities would exist before the point of retirement.
- Why has the Contract been constructed in this way if it was not intended for deferred annuities to be purchased? The Contract could instead have just said that the money should be invested on the basis of Condition 5 (2) and at the point of retirement an annuity would be bought.
- There are many similar inconsistencies within the Contract which only make sense if the intention was for deferred annuities to be purchased as soon as practicable.
- Counsel’s opinion was drafted with the intention of justifying the investment approach, but it is unsatisfactory and flawed. Clerical Medical has no justification for exercising legal privilege over the advice.
- The interpretation of the Contract is relevant to all similar customers of Clerical Medical, but it can be inferred that Counsel’s opinion was sought in response to this complaint. This illustrates how serious this matter is as it will impact many customers of Clerical Medical, with existing and discontinued policies.
- It is hard to believe that the summary of Counsel’s opinion provided by Clerical Medical is incompetence. It is a lie on the part of the person who wrote the summary, or by Counsel, or both. It should be investigated by The Pensions Regulator, the Financial Conduct Authority, the Law Society of Scotland and/or the Bar Council.
- In addition, there are other matters previously referred to concerning Clerical Medical’s response and the mis investment of the policy holder’s funds for many years which, as appropriate, will be reported to the relevant Regulator.
- It is unclear what loss Mr L may have suffered because of this mis investment, but Clerical Medical should be required to undertake a loss comparison between the investment in the with-profits fund and the purchasing of deferred annuities in order to establish whether a loss has arisen.
- It would have been a considerable cost for the Trustees to establish if there were disadvantages to the change to deposit administration and that cost could only have been borne by the members. To confirm the loss would also have taken many months.
- Clerical Medical will be required to meet this cost if The Pensions Regulator (**TPR**) decides to investigate the matter.
- The likelihood that a loss has occurred is demonstrated by the fact that Clerical Medical was keen to formalise the changed investment approach through conversion process.

- On the issue of the GARs, this complaint has been misunderstood by TPO.
- On agreeing to the conversion, Clerical Medical opportunistically stipulated that further contributions, including transfers in, would only benefit from the GARs up to a cap. This took advantage of the position of the Trustees, who could not delay accepting the conditions as APG would have gone into liquidation. So, there was considerable pressure for the Trustees to agree.
- In being excused the obligation to provide GARs, Clerical Medical had a windfall as its exposure to this risk has reduced.
- This restriction on GARs has no justifiable grounds.
- The reason for the conversion from defined benefit accrual to defined contribution was that if it did not happen, the sponsoring employer would have gone into liquidation immediately and the Scheme would have required Pension Protection Fund (**PPF**) assistance. Entry to the PPF would have resulted in reduced benefits compared to if the Scheme converted to DC., but these would only be available if the Trustees agreed to alter the Scheme. Therefore, the Trustees had no option but to accept Clerical Medical's terms.
- This was not intended to protect Mr L's continued employment. That implies that Mr L acted in bad faith. The only reason for the conversion was that the conversion to DC was more beneficial than entering the PPF. This was a decision supported by the Scheme's members and endorsed by TPR.
- Clerical Medical may or may not have had the legal right to restrict the GARs.
- But, as a result of the conversion, Clerical Medical was excused the role of administering the Scheme and providing actuarial services. In doing so it did not waive the 0.25% annual charge that it levied for those services. Clerical Medical benefited from the conversion without providing anything in exchange.
- Clerical Medical therefore took advantage of the urgency of the need to convert by reducing the services it provided, along with the entitlement to GARs in the future, whilst offering nothing in return. The Trustees had no option but to agree.
- The restriction of the GARs was an unjustifiable enrichment.
- Any other schemes subject to the Contract continue to benefit from the GARs, and so the members of the Scheme are at a disadvantage to those other schemes and are subsidising the members of those schemes who have full access to GARs. This is unfair and discriminatory to members of the Scheme.
- The Scheme being closed to future accrual at the point of conversion is irrelevant. Members, with the agreement of the Trustees could still make contributions. But by ceasing future accrual, the Trustees had saved Clerical Medical the future costs of providing GARs for future contributions.

- But in any event, the conversion to DC did not alter Clerical Medical's liability, there is no suggestion that post conversion, members' contributions would increase.
- As a result, the restriction of GARs was an unfair contractual term under law and under the FCA's Treating Customers Fairly regime. Clerical Medical is treating the Scheme's membership differently to the members of other schemes subject to the Contract, who have access to the GARs.
- The Trustees are not professional trustees. This arrangement was a feature of the Scheme that Clerical Medical promoted, saying that the Trustees would have very little to do. It is not reasonable to expect the Trustees to have done more than they did.
- The matter has recently been referred to TPR, which has said it is very interested in the matter and is considering an investigation. Until that is complete it is premature for TPO to determine the case.
- The negotiations were conducted with the Scheme's actuary. The same actuary who had blown the whistle on the incorrect investment approach. The Trustees made the Actuary aware "that they might make more of this,"
- The condition within the Memorandum would not have been included if it was not for the actions of a senior actuary who was very cavalier and only concerned for Clerical Medical's interests. The Scheme actuary on the other hand knew her duty was to the Scheme. She retired during the process of conversion, at the age of 50 without reason being given. This "peculiar" retirement came about because of friction between the Scheme actuary and the senior actuary. It was this matter that triggered her retirement.
- TPO attempts to observe the letter of the law when it is to Clerical Medical's advantage, but when something benefits the members TPO takes a common-sense approach rather than applying the law strictly.
- TPO should have referred the matter to TPR. Had this been a matter for the FCA, Clerical Medical's actions would have been thrown out.
- TPR's investigation will cover the elements of Mr M's complaint that were deemed out of jurisdiction by TPO for no good reason. TPO is letting Clerical Medical "off the hook" and applying double standards.
- TPO appears intent on a cover up, whereas TPR will look at this Scheme and all similar Schemes operated by Clerical Medical. The members will also follow up the matter with their MPs.
- TPO has little experience handing cases involving small insured schemes such as here and is more comfortable where the member is in dispute with trustees rather than administrators. The Trustees in this case are blameless.

Summary of Clerical Medical's position

24. The investment approach has been consistently communicated as a Deposit Administration Contract and the Memorandum only sought to clarify this in the context of the conversion of the Scheme. It does not imply that the funds were not invested in accordance with the terms of the Contract.
25. In respect of the GARs, Clerical Medical disagrees that it took advantage of the Trustees. The cap allowed the Trustees to access the same GARs as under the DB scheme, whilst protecting the interests of the With-Profits Fund as a whole. To not have done so could have been detrimental to other with-profits investors, and Clerical Medical has a duty not to allow such detrimental changes.

Conclusions

26. I should make clear at the outset that the complaints which were accepted for investigation were accepted on the basis that Mr L was acting in his capacity as a member and beneficiary of the Scheme, and not in his capacity as a Trustee.
27. Mr L is concerned that Clerical Medical has failed to invest the premiums paid to Clerical Medical in line with the provisions of the Contract, which was concluded with the Trustees. Specifically, that instead of purchasing deferred annuities with the contributions, it has invested them in its with-profits fund. Additionally, he considers Clerical Medical acted in breach of the law, unfairly, or at least without justification when restricting the application of the GARs.
28. Having considered these arguments, I find that the issues which Mr L has raised go beyond his role as a member. In respect of Clerical Medical's investment of premiums, Mr L is alleging a breach of contract between Clerical Medical and the Trustees. In respect of the GARs, he implies that Clerical Medical has taken commercial advantage over the Trustees. He is, in substance, making representations as a Trustee. He has not explained how Clerical Medical's conduct is alleged to have caused injustice to him as a member. I understand the contention that deferred annuities could have been bought in increments rather than the funds invested as Clerical Medical says it has, but I have seen no evidence that any failure to do that has caused injustice to Mr L as a member.
29. Mr L also appears to have ignored the role which the Trustees had in this position coming about. I consider that, after the conversion of the scheme from DB to DC, the Memorandum clarified any uncertainty as to how premiums should be used and preserved the rights of members to have GARs applied to future contributions, so long as the contributions did not exceed the scheme deficit at the point of conversion. The Memorandum was agreed by the Trustees, of which Mr L was one. It is not appropriate for Mr L to complain about Clerical Medical's position when he and his fellow Trustees agreed that this is how the Scheme should be operated.
30. I draw Mr L's attention to the following within the Memorandum:

“Notwithstanding any reference to deferred annuities in condition 6 or elsewhere in the Contract, any premiums already or to be received by Clerical Medical will not be used to purchase deferred annuities as detailed in condition 6(1). Instead premiums will be held on deposit by Clerical Medical until such time as the Grantees instruct Clerical Medical to use such premiums as are necessary to provide annuities or other benefits for and in respect of members as detailed in the rest of condition 6. The Guaranteed annuity rates referred to in condition 6(1) will continue to apply to annuities purchased by the premiums as defined in condition 4(1) and restricted by Condition 10.”

31. I find that, whatever the position prior to its signing, following the Trustees’ agreement to the Memorandum, there was no requirement for Clerical Medical to purchase deferred annuities either with historical or future premiums. Whether or not the Contract had been operated incorrectly historically, by signing this agreement the Trustees’ were effectively ratifying Clerical Medical’s approach to investing the premiums in its with-profits fund.
32. I understand that Mr L and the other Trustees are not professional trustees, but they had professional assistance in the negotiation from Wilson Edwards. Additionally, the uncertainty over the correct investment approach was known to the Trustees well in advance of the final phase of the negotiations, and at least as early as August 2010. Indeed, the Trustees threatened “that they might make more of this”. Nevertheless, the Trustees subsequently agreed the Memorandum.
33. I appreciate that financial pressures limited the Trustees’ options, but that does not make the Memorandum ineffective.
34. In regard to the GARs, the Memorandum states:

“Any premiums as defined in condition 4(1) of the contract paid after the Conversion Date shall:

Be limited to the amount of the Cap

Shall exclude contributions for and in respect of any member who joins the Scheme after the Conversion Date.”
35. This is an unambiguous term and there is no suggestion that the Trustees misunderstood the implications of this. The Cap restricted the level of premiums that could be paid and the Trustees agreed to this restriction. Wilson Edwards, who represent Mr L in this complaint advised the Trustees at the time.
36. The concerns Mr L has raised arise from provisions of the Contract that have been agreed or ratified by the Trustees. Therefore, if Mr L is dissatisfied by the effect of the Memorandum the appropriate time to raise those concerns was prior to agreeing to the Memorandum. It follows that the appropriate respondent to a complaint about the effect on a member of terms agreed by the Trustees would logically be the Trustees themselves and not Clerical Medical.

PO-10833

37. I find no reason to say that the Memorandum is not effective, and there is no evidence that Clerical Medical has not administered the Contract in accordance with the Memorandum.
38. As a result, I find no maladministration on the part of Clerical Medical and do not uphold Mr L's complaint against it.

Anthony Arter

Pensions Ombudsman
21 January 2021