

Ombudsman's Determination

Applicant	Mr Martin Sayer.
Scheme	Paine Webber (UK) Pension Plan (formerly The Blyth Eastman Paine Webber Benefits Plan) (The Plan).
Respondents	Abbey Life Assurance Company Limited (Abbey Life), Towers Watson Limited (formerly known as Watson Wyatt and previously the Wyatt Company) (Towers Watson).

Complaint Summary

Mr Sayer has complained that Abbey Life and Towers Watson failed to inform him that his entitlement under a policy (numbered 250302162Y) (**the Policy**) attracted guaranteed annuity rates (**GARs**), when he transferred out of the Plan in 2002.

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld because:

- the respondents were not advising the applicant about a transfer out of the Plan; and
- there was no mandatory obligation to disclose information regarding GARs on transfer.

DETAILED DETERMINATION

Jurisdiction Issue

Abbey's Position

1. Abbey Life disputes the jurisdiction of the Pensions Ombudsman in relation to it. Abbey Life argues it is not an administrator within the meaning of regulation 1(2) of the Personal and Occupational Pension Schemes (Pension Ombudsman) Regulations 1996 (the Ombudsman Regulations). It is only the policy provider.
2. It believes it is in a similar position to Britannic in the case of *R v Pensions Ombudsman, ex parte Britannic Asset Management* [2002] EWCA Civ 1405 (**Britannic 2**). It considers Towers Watson was the administrator.
3. Although the other parties to this complaint both say that the facts demonstrate Abbey Life is also a person concerned with the administration of the Plan, Abbey Life is unclear which of the facts referred to are said to demonstrate that. But, in any event, it does not agree that any facts demonstrate this.
4. The recently cited case involving the Government Actuaries Department (**GAD**) bears no relation to the present one on the facts. GAD had a duty to consider whether to revise tables imposed as part of the structure of the scheme. There is no analogy between that role, and the role of Abbey Life.
5. In *Britannic 2*, Chadwick LJ stated at paragraph 31 that:

“The Pensions Ombudsman appears to have taken the view that, a person who undertakes ‘an act of administration concerned with the Scheme’ is a person ‘concerned with its administration of the Scheme’. But that view ignores the important distinction between doing an administrative act in connection with a pension scheme and being concerned with its administration”.
6. Section 275(1) of the Pensions Act 2004, introduced section 146(4A) of the Pension Schemes Act 1993, to reverse the *Britannic* decision, but the amendment had effect on or after the day on which that section came into force (i.e. from 6 April 2005). Mr Sayer transferred out in 2002, and so the event pre-dates the date of the amendment. Hence, section 146(4A) does not apply.
7. *Britannic Unit-Linked Assurance Limited* (**BULA**) did offer (within clause 12 of its policy) a full or partial administration service to the trustees of occupational pension schemes, at an extra charge. The services included: actuarial services; the keeping of records of members; their salary details, and other data necessary to calculate benefits; calculating benefits and contributions; preparing transfer value quotes for early leavers; corresponding with the Pension Scheme Office (**PSO**) of the Inland Revenue (**IR**), where necessary; and dealing with announcements to members and the like. However, the trustees of the Chenay Pension Scheme did not take up that option.

8. Like Britannic, Abbey Life did not provide actuarial services. Whilst Abbey Life holds the names of the members of the Plan, as part of its own records (as opposed to doing so on behalf of the Trustee), it does not hold the salary details of members. Like Britannic Investment Managers (**BIM**), Abbey Life is not involved in calculating the contributions payable. Abbey Life only provides members' transfer values for Plan funds held with Abbey Life, not for the Plan's funds held elsewhere (e.g. in the Guardian Royal Exchange Managed Fund in which Mr Sayer's retirement fund appears to have been partially invested).
9. Like BULA, Abbey Life is not responsible for drafting and circulating any member communications in relation to the Plan, or for dealing with matters such as correspondence with Her Majesty's Revenue and Customs (**HMRC**), or the Pensions Regulator.

Decision on preliminary jurisdiction issue

10. For the reasons set out below, my view is that I may investigate Abbey Life for actions prior to 6 April 2005.
11. I acknowledge that the amendments to the Pension Schemes Act 1993 are not retrospective, and so the test of whether a person is an administrator before April 2005, is that set out in the case *Britannic Asset Management v Pensions Ombudsman* [2002] 49 PBLR (**Britannic 1**) and Britannic 2.
12. Paragraph 23 of Chadwick LJ's judgment in Britannic 2 has been cited, and it was accepted that an insurance company which provides full or partial administration services may well be a person concerned with the administration of a scheme.
13. A distinction was drawn at paragraph 31 of that judgment between a person concerned with the administration and a person who undertakes an act of administration. On the evidence, it was found that Britannic was not concerned with the administration of the Chenay Pension Scheme. Clearly, though, each case has to be considered on its own merits. For example, the Chenay Pension Scheme was a defined benefit occupational pension scheme, and so the application of GARs did not apply.
14. When considering whether Abbey Life is 'concerned with the administration of the Plan' it is necessary to look beyond what administration was undertaken for Mr Sayer's benefits alone.
15. A useful paragraph in this respect is paragraph 20 of Lightman J's judgment in Britannic 1 where he gave several examples. He said,

“... In my view the Claimants are correct when they say that ‘administering the Scheme means (in whole or in part) running the Scheme, e.g. inviting employees to join, keeping records of members, communicating with members, calculating benefits, providing benefit statements, paying benefits when due, keeping documentation up to date, dealing with the government or regulatory agencies ... etc ... But the touchstone is whether he is engaged to act, or advise, in or about the trustees' affairs in running the Scheme”.

16. Abbey Life has identified areas where it considers it is not involved in certain administrative tasks. As noted above, a person only needs be partially involved in providing administration services to be regarded as 'concerned with the administration of a pension scheme'. Whilst Abbey Life does not wholly provide administration services, it is evident that it has been and, to a lesser degree, still is partially involved in the running of the Plan. The degree of its involvement has changed over the years.
17. Although Abbey Life says it records members' names for its own purposes (and not for the Trustee), all the individual policies for the members are held under a scheme reference number (250302000F). Nonetheless, it is a form of keeping member records for the Trustee as regards to a member's benefit entitlement under the Plan.
18. Abbey Life also says it is not involved in calculating the contributions payable. I note contributions were initially invested wholly with Abbey Life, but from around 1986 the investment choice was widened so latterly they may have been invested elsewhere. Accordingly, a member's benefit may be entirely with Abbey Life, split between Abbey Life and a different pension provider, or not with Abbey Life at all. Nonetheless, Abbey Life records the money (contributions) invested with it for each member where the Trustee effected a policy with it, as opposed to in respect of the Plan as a whole. In addition, the full policy proceeds are not available on early encashment, and Abbey Life is involved in calculating the transfer value that is payable.
19. From correspondence presented, it seems Abbey Life was more involved with the administration of the Plan in the 1970s, 1980s and 1990s. For instance, Abbey Life originally prepared illustrations for members, and drafted the initial announcement letters to members for the Trustee. The other correspondence I have seen shows Abbey Life sending out transfer value information, and benefit statements directly to members in the 1990s and even early 2000s. Abbey Life is, therefore, involved in setting the transfer value factors to calculate a member's transfer value where money is held in policies with it. A person involved in 'pure' investment management, like BIM, would not undertake such tasks. Further, a member's benefits are the policy proceeds, and Abbey Life calculates the amount for at least some, if not all, of the member's retirement fund. The Trustee may elect for Abbey Life to then pay the member's pension on its behalf under the Plan.
20. The GARs at various ages on the 'benchmark basis' are set out in Schedule I to the Policy. The Plan's rules allow the Trustee to provide benefits for the member (as the member must elect) subject to the pension in payment being paid in monthly instalments and complying with section 51 of the 1995 Pensions Act, for indexation purposes. Those requirements do not conform to the benchmark basis for GARs set out in the Policy. Nevertheless, Abbey Life has confirmed that where retirement benefits are provided on a non-benchmark GAR basis by the Plan's Trustee under the Policy, Abbey Life calculates 'an uplift' in order that a member still gains from the

GAR terms under the Policy. It seems Abbey Life is the only body who can perform that function in calculating a member's pension benefit on those enhanced terms.

21. So the ongoing and continual contractual obligation that the Trustee may impose on Abbey Life under the Policy to produce retirement figures, which then involves it calculating 'uplift' figures for each member at retirement, is more than a one off administrative act carried out in connection with the Plan – it makes Abbey Life concerned with the Plan's administration of calculating and, if engaged by the Trustee, to actually provide those benefits.
22. Further, the Policy is between Abbey Life and the Trustee. Any contractual duty imposed on Abbey Life is further evidence of its administrative role i.e. acting on the side of the Trustee. "It is the essence for a person to be or act as an administrator that he shall have assumed an administrative role ... "on the trustee's side" ". The duty amounts to being "involved with an act of administration for the Trustee (whether by carrying out such an act or advising on it)".
23. Mr Sayer's complaint relates to May 2002 when he transferred out of the Plan. At that time, Abbey Life was still (i) calculating fund and transfer values for those Plan members with whom the Trustee held policies with it, (ii) issuing pre-retirement packs for members' approaching their normal retirement date (the details for which it held), and (iii) calculating and paying members' retirement benefits (as some members have elected Abbey Life to provide their pension) and accounting for income tax on behalf of the Trustee of the Plan.
24. I have now reviewed the evidence in this case and my view is that Abbey Life is concerned with the administration of the Plan. Abbey Life is involved in setting the factors it uses when assessing the benefits payable from the relevant Abbey Life policy for each member. This feeds into calculating, either in part or wholly, the members' benefits (and, if appropriate, details of any GAR, or uplift at retirement) and in some instances paying members' pension benefits on behalf of the Trustee. This is more than merely acting as an investment manager, that is taking money, investing it, and then paying back the invested monies to the Trustee.

Relevant Scheme Documentation, Provisions and History

25. The Plan is a defined contribution (or money purchase) occupational pension scheme, which was established on 27 September 1974. The trustees were initially named individuals, which have changed over time, but more latterly there has been a corporate trustee, PaineWebber (UK) Pension Trustees Limited (**the Trustee**).
26. Abbey Life says a proposal was made by the Trustee of the Plan for the issue of a policy in respect of each member to participate in the Plan. It was intended that a policy would then be issued to the Trustee, as policyholders, but earmarked to provide benefits specifically for the individual named as the 'Life Assured' of the policy. The policy is an individual policy issued in respect of each member.

27. Abbey Life has supplied an employer's guide (based on information at November 1975). Under the heading 'What are the Plan's Features?' and sub-heading 'Security' it said:
- "4. Minimum rates are guaranteed at which pensions are purchased even if the most favourable market rates are below these.
28. The employer's guide also said under the heading 'What benefits are available?' and sub-heading 'What retirement benefits will be received?':
- "A most important option which the Plan provides is that at or after normal retirement date, Abbey Life will release the Fund available without any penalty so that a pension can be purchased at the best rates available in the market at that time. This is a valuable option since no insurance company can guarantee that they will always have the best rates. By using this option, you can ensure that the best market rates are available to you. Moreover, Abbey Life guarantees minimum rates whatever the market conditions when any of your employees retire as shown below."
29. On 18 October 1979, Abbey Life sent a letter to the Company Secretary of Paine Webber Mitchell Hutchins International Inc, and said:
- "We enclose with this letter the portfolio of formal documents relating to the above Plan and confirm that the policy numbers for the individual members are as follows:-
- | Member's Name | Policy No. |
|---------------|------------|
| ... | |
- The member's announcement and illustration are enclosed, together with the following documentation, which should be retained by the Trustees in a safe place:-
- (1) A specimen set of rules.
- (2) A specimen of the policy conditions.
- (3) Text of letter to the member from the Trustees. This should be typed on your own headed paper and given to each member.
- The Rules and Policy Conditions are presently awaiting formal Inland Revenue approval and may therefore be subject to amendment. We will send you a copy of the Rules for your adoption together with the Policy Document as soon as these have been approved".
30. Mr Sayer was not listed among the member(s) within the letter of 18 October 1979.
31. Abbey Life has supplied copies of other letters it issued to the employer, dated 18 March 1980; 11 July 1980; 23 September 1980; and 19 November 1981, covering several other members (though, again, not Mr Sayer). These letters are similar to the one of 18 October 1979.

32. The specimen policy document related to Abbey Life's Directors and Executives Retirement Plan (**DERP**). Abbey Life said the Policy's conditions would be, as a matter of general practice, sent in specimen form only by Abbey Life to the employer on a member-by-member basis. Abbey Life believes Series 2 DERP policies, the type Mr Sayer had, were approved by the Superannuation Funds Office (**SFO**) on 23 November 1984.
33. Section 11 (Retirement Benefits) of the Policy's conditions and in particular 11.1 says:

"On retirement of the member the Benefit Fund shall be calculated and shall be used by the Policyholder to provide Retirement Benefits for the member and/or his Dependants in accordance with the Rules. If the Benefit Fund is used to purchase a pension from the Company the annual rate of pension guaranteed to be payable for a minimum period of 5 years shall not be less than the rate stipulated in Schedule I".
34. Abbey Life is defined elsewhere within the Policy's conditions as "The Company" and "Benefit Fund" is defined in section 2.6. Schedule I sets out the minimum guaranteed annual amount of pension per £1,000 of benefit fund for both male and female members for a range of ages between 50 and 70 (see Appendix).
35. An internal memorandum within Paine Webber dated 4 December 1986, and addressed "To: Member of the Pension Plan", indicates that the Plan became self-administered in May 1986, and was the reason that some units were shown as Abbey Life and others as Guardian Royal Exchange (**GRE**).
36. When Mr Sayer left the Plan and became a deferred member in 1987, the Plan was governed at that time by a Trust Deed and Rules dated 24 August 1979 (**the 1979 Rules**).
37. Rule 2 (Calculation and Provision of Benefits) and, in particular, sub-rule (b) of the 1979 Rules said the Trustee must effect a policy in respect of each member to provide such benefits (other than death benefits) under the Plan, as notified by the employer, and the Trustee must give the Member concerned particulars of such policy.
38. Rule 17 (Open Market Option) said that, on the member becoming entitled to immediate benefits, the Trustee may apply in writing to the Assurer to use all or part of the cash value of such benefits. Assurer was defined as any insurance company with which benefits under the Plan were secured or insured. One of the provisos (sub-rule (b)) was that the pension so purchased must not be less than the pension which could have been provided under the Policy.
39. Rule 19 (Leaving Service) effectively said that, a member with five years' qualifying service (or one with less than five years provided he was not dismissed because of a criminal, negligent or fraudulent act) could elect to receive the benefits secured by the proceeds of the Policy effected in respect of him, or a transfer of such amount as the Actuary advises be made in accordance with Rule 25.

40. The Rules were replaced in 1989 and the proviso at rule 17(b) of the 1979 rules was not carried over in to those new 1989 rules.
41. At the time of Mr Sayer's transfer out of the Plan, the Plan was governed by a Deed of Amendment, Adoption and Consolidation dated 6 April 2000 (though effective from 6 April 1997 unless stated otherwise). Rule 22 (Transfers-Out) of these rules effectively gave Mr Sayer a transfer right (subject to the provisions within that rule).
42. Towers Watson says, Executive Benefit Services (UK) Limited appears to have been engaged by the Employer and/or the Trustee at outset, as benefit consultants, and carried out certain administrative tasks. It also believes Abbey Life undertook administrative tasks. Hymans Robertson subsequently became involved with the Plan's administration up until 31 October 1990, with Towers Watson taking over from Hymans Robertson on 1 November 1990.
43. In a letter dated 10 August 1990, to Hymans Robertson, Abbey Life said:

"Having liaised with our Technical Department I would advise the following:

The Abbey Life arrangement was set up under the Scheme, The Blyth Eastman Paine Webber Benefits Plan (formerly The Paine Webber Benefits Plan). This scheme was established in 1974 under a Trust Deed, individually drafted by Slaughter and May. Slaughter and May also individually drafted the rules of the scheme and after negotiations between themselves and the SFO, in the intervening years, the scheme received formal approval in 1980. Therefore, the Abbey Life arrangement is not governed by the standard Abbey Life Directors and Executives Retirement Plan rules and we suggest you contact Slaughter and May regarding the investment powers contained in the rules of the 1974 scheme."
44. In a letter dated 9 August 1993, to Abbey Life, Towers Watson said that in order that the Plan may be recorded as a Company Pension Scheme it would provide, as administrators, any Maximum Benefit Certifications which may be required. That same letter also pointed out that policy documents for the Plan were still being held in Abbey Life's London office, and so its records should reflect that so Abbey Life did not ask to return a policy each time a member wished to transfer out.

Material Facts

45. Mr Sayer joined Paine Webber International (UK) Limited on 19 September 1984, and the Plan on 1 May 1985. The Company paid contributions in respect of him at a rate of 10% of his salary and bonus sacrifice contributions of £34,795 and £23,160 were paid into the Plan on 11 December 1985, and in January-March 1987. In addition, a transfer payment of £10,729.21 was paid into the Plan on 7 November 1985. Mr Sayer also paid additional voluntary contributions (**AVCs**).
46. Abbey Life says it issued a policy to the policyholder, i.e. the Trustee, for Mr Sayer's benefit.
47. Mr Sayer left the Company and the Plan on 1 November 1987.

48. At the time of his leaving, the Trustee held 1,596.52 capital units in the Abbey Life Managed Fund, 10,286.96 accumulation units in the Abbey Life Managed Fund, and 8,265.53 units in the GRE Managed Fund, for Mr Sayer's benefit.
49. Towers Watson says that details of Mr Sayer's deferred benefits were supplied to him by them in: March 1991; May 1991; June 1993; December 1993; April 1997; and between June and November 1997. On each occasion it was necessary for it to approach Abbey Life about the benefits under the Policy.
50. Most of this correspondence simply quoted the combined fund and transfer values, having obtained details from Abbey Life and GRE. However, Towers Watson's correspondence of 3 December 1993, went into more detail.
51. Towers Watson said a transfer to a personal pension had to be certified that the benefits did not exceed IR limits for members who earned over £60,000 a year (which Mr Sayer had done). The IR maximum benefits (excluding retained benefits) were said to be £4,515 per annum (pension) and £10,160 (lump sum). On the post 1989 tax regime basis, the IR maximum benefits would be £6,166 per annum (pension) and £13,874 (lump sum).
52. Their letter of 3 December 1993, went on to discuss a transfer to a personal pension and said, as Mr Sayer's benefits were well in excess of IR limits, this option was not available to him (though he could transfer to another occupational pension scheme, or to a section 32 buy out policy). However, the wording of the Transfer Payment Regulations 1988, covering this certification would allow a transfer to a personal pension after ten years of leaving Paine Webber without any certification, i.e. after 1 November 1997. It was also suggested that Mr Sayer elect for the post 1989 tax regime, but even then it was highly likely that he would not be able to use his full retirement fund at normal retirement age. In view of the over-funding position, if Mr Sayer were to retire at age 50 a much larger proportion of his retirement fund might be utilised. If inflation averaged 9% a year he might be able to use the whole of his retirement fund. Another option that was suggested was taking a refund of his AVCs.
53. On 8 June 1999, Towers Watson wrote to the Trustee's legal adviser, Richards Butler (now known as Reed Smith LLP) about Mr Sayer. Based on Mr Sayer's then current fund value of £400,480, it was estimated that the fund at age 50, assuming growth of 6% per annum, would be £611,010. On the basis of Mr Sayer electing to be treated as a post 1989 member for IR maximum benefit purposes, the estimated cost of purchasing the maximum pension available at age 50, with RPI escalation and a two-thirds spouse's pension, was said to be £504,344. In addition, Towers Watson estimated that the value of Mr Sayer's AVCs at age 50 would be £77,313.
54. On 28 June 1999, Richards Butler wrote to the PSO of HMRC seeking clarification of the treatment of Mr Sayer. Details of Mr Sayer's pensionable service were given, and that he was considering an election to be treated as a post 1989 member for IR limit purposes. The letter also said,

“If Mr Sayer does make this election, please could you confirm that the maximum benefit that could be paid to Mr Sayer on his retirement is as set out in Practice Notes 10.13 / 7.4 / 7.7 (1997 Version) and that the actuarial equivalent of the benefit the member could have expected to receive at normal retirement date may be calculated on the incapacity basis allowed under PN10.13(b).”

55. The PSO confirmed on 19 July 1999, that Mr Sayer may be treated in accordance with Richard Butler’s suggestion.
56. On 1 September 2000, Mr Sayer appointed Cameron Rowe Independent Financial Advisers (**the IFA**). He authorised the IFA to obtain all information about his existing pension arrangements (and other investments) to enable them to give him advice. The IFA sent that authorisation to Mr Sayer’s former employer on 5 September 2000, and requested details of the then current fund value and transfer value for him under the Plan. They, in turn, sent the request to Towers Watson.
57. Towers Watson liaised with Abbey Life (and GRE), and subsequently wrote to the IFA on 6 October 2000, saying the fund value was £434,157.30. They said Mr Sayer’s benefits were in excess of IR limits and a transfer to a personal pension was not possible. But if Mr Sayer elected to be subject to the post 1989 tax regime, there may be sufficient scope to utilise the whole of his retirement fund by taking early retirement at around age 50, and provided an election form. This form would be required before a transfer could proceed.
58. Winterthur Life (UK) Limited (Mr Sayer’s new pension provider) wrote to the Trustee on 11 July 2001. It said Mr Sayer wanted to transfer his pension to them. Enclosed were a completed Transfer Agreement Form and an Election Form (to be treated under the 1989 tax regime) signed by Mr Sayer.
59. On 11 September 2001, Winterthur Life re-sent the information of 11 July, to Towers Watson.
60. There was further correspondence in October 2001, between Towers Watson and Winterthur Life, about the possibility of a transfer given the funding position of Mr Sayer’s benefits. On 1 November 2001, Towers Watson told Winterthur Life that, after checking, the restrictions that prevented a transfer on leaving no longer applied as a result of the time elapsed, and a transfer of Mr Sayer’s main scheme benefits could proceed. But Mr Sayer also had surplus AVCs, and Towers Watson asked how he wished to proceed.
61. Winterthur Life replied the same day, and provided a fax from Mr Sayer’s IFA which said “Please transfer everything, including surplus AVC’s, with immediate effect”.
62. On 21 November 2001, Towers Watson spoke on the telephone with Mr Sayer. It told him a transfer could now take place but was finding out about how to treat his excess AVCs. It said it would write to his IFA confirming final figures in order that a decision could be made on whether to proceed.

63. Mr Sayer emailed Towers Watson on 21 November 2001, saying he had been asking various people from Paine Webber and Towers Watson for certain information. In particular, he said,

“On [50th birthday] what can I realistically expect to receive as a pension? What would I get as a lump sum? Have it confirmed that it is within Inland Revenue rules.

My biggest fear is to reach that date to be told that my pension is lower because of Inland Revenue Rules, and I am given back my contributions less tax.

I made large salary sacrifices so that my pension would be large, I have real fears because NOBODY seems to be able to tell me what is going to happen [or] this will no longer be the case.

I intended moving all my pensions into a private pension so I knew where I stood and had a good idea of how much I was going to receive and when. I wasn't aware of the letter dated 10/00 because I was out of the country.

I really do not want to take AVC contributions back less tax because:

- a) I want the money to go towards my pension;
- b) I want it to grow tax free;
- c) Whatever money I get back would be devalued by 14-15 years of inflation.

If you could sort this ongoing mess out I would be truly grateful, I must be one of the few people in the country who is worried about their pension because they have put to[o] much in it!

Upon receipt of your findings/solution I will then make a decision as to whether to leave it where it is, or if allowed transfer it to a private pension.”

64. On 30 November 2001, Towers Watson told Winterthur Life about the discussions with Mr Sayer, and said it would be writing to the IFA. It also said it would send a copy of its correspondence to Mr Sayer and Winterthur Life.
65. Towers Watson replied to Mr Sayer by email on 5 December 2001, saying it was sending him his annual benefit statement, and a copy of its letter of 6 October 2000, to his IFA. It said it was originally working on the calculation of the excess AVCs in order to confirm the detail prior to any disinvestment and subsequent transfer. But it was being chased by Winterthur Life to pay over the transfer value from the Plan. On the basis of his email, it was calculating his estimated benefits from the Plan at age 50. Towers Watson asked him to make his IFA aware that he was considering all options.

66. Mr Sayer's IFA telephoned Towers Watson on 6 December 2001, saying he had spoken to Mr Sayer yesterday (5 December). The telephone note records that the IFA confirmed Mr Sayer wished to go ahead with the transfer, and had explained the background to the transfer request (though the note does not give further details). A re-quote of the transfer value was requested. The note also records that Mr Sayer had previously contacted Towers Watson in November 2001 and he had said he wanted an estimate of benefits from the Plan at age 50.
67. Abbey Life faxed over the fund and transfer values for the Policy to Towers Watson on 13 December 2001. Later that day, the IFA telephoned Towers Watson saying he had spoken to Mr Sayer who wished his funds to be transferred as soon as possible.
68. On 9 January 2002, Towers Watson spoke to the IFA. Towers Watson said it was waiting for the actuary to check the calculations of benefits within the Plan and the position on excess AVCs. The IFA believed Mr Sayer had received a letter from HMRC confirming benefits were within limits (including AVCs) on the basis of being treated as a post 1989 tax regime member and early retirement at age 50 on incapacity. HMRC's letter was, in fact, the one line letter of 19 July 1999, it had written to Richard Butler, which was faxed to Towers Watson on 16 January 2002.
69. A facsimile message was sent on 18 January 2002, from Towers Watson to the IFA (Cameron Rowe), in which it was noted that Towers Watson had had telephone conversations with the IFA and Mr Sayer. It was stated that Mr Sayer had sent an email at the end of November and summarised what Mr Sayer had been seeking. The facsimile also said the IFA told Towers Watson on 9 January 2002, that there had been some misunderstanding by Mr Sayer, and that he definitely now wished to proceed with the transfer and would be sending a letter of confirmation. That fax also noted from a conversation with Mr Sayer on 18 January 2002, that he would send an email on 21 January 2002, confirming his wishes that the transfer should proceed provided the AVCs could be included.
70. As a result of this fax, Towers Watson says no benefit estimate was in fact provided to Mr Sayer before his transfer went ahead, and Mr Sayer elected to transfer his benefits without considering a projection of the benefits he could receive under the Plan at age 50.
71. In reply to Towers Watson's email of 28 January 2002 (which I have not seen), Mr Sayer emailed Towers Watson on 6 February 2002, saying:

"As I understand it as I left Paine Webber over 10 years ago, was not a Director nor Shareholder I am entitled to transfer all my pension and AVC's over to a private pension and not be penalised by the Inland Revenue.

...

All I am looking to do here is to have ALL my pensions and AVC's under one umbrella, be within Inland Revenue Rules, and to have some rough idea subject to growth as to what size pension I will have come aged 50 in just over 4 years' time".

72. In January and February 2002, there was a further exchange of correspondence between Towers Watson and Winterthur Life about outstanding requirements for a transfer, including obtaining details of Mr Sayer's 'retained benefits'. Mr Sayer completed a retained benefits form on 18 February 2002, setting out his other benefits under the Credit Suisse Group (UK) Pension Fund.
73. On 28 March 2002, Towers Watson emailed Mr Sayer, and copied in his IFA, acknowledging his email of 6 February, and the 'retained benefits' form. It told him it had completed checks on the Transfer Payment Regulations 1988 and confirmed a certification that benefits were within IR limits on transfer no longer applied. However, under the preservation regulations there was a maximum transfer value that could be paid. Approval for Mr Sayer had been obtained from the IR to have his benefits treated under the incapacity rules, and this increased the maximum benefits and, therefore, the maximum transfer value considerably. The transfer could proceed.
74. In April 2002, arrangements were put in hand to divest Mr Sayer's benefits from the Plan. Guardian Assurance plc (formerly GRE) issued a cheque for £137,213.34 in favour of the Plan's Trustee on 15 April 2002.
75. Abbey Life issued a Surrender and Discharge form on 16 April 2002, to Towers Watson, which the Trustee signed and returned on 18 April 2002. The letter's subject title makes reference to the Plan's name, the Policy number and the Member's name. The form itself is headed "Abbey Life Trustee Investment Plan Surrender and Discharge".
76. On 30 April 2002, Abbey Life sent a cheque for £221,675.08 in favour of the Trustee to Towers Watson, which was said to represent "the total surrender and discharge of the above Trustee Investment Plan".
77. On 22 May 2002, a transfer payment of £358,888.42 was made from the Plan to Winterthur Life Appropriate Personal Pension Plan in respect of Mr Sayer's benefits.
78. Following an investigation into the winding-up of the Plan by Hargreaves Lansdown, Towers Watson says it was not conclusively aware that a GAR applied until Hargreaves Lansdown confirmed this was the case at the Trustee's meeting held on 21 September 2006.
79. The Trustee says that when it became aware that Abbey Life and Towers Watson had failed to provide details about the availability of the GARs to members of the Plan, it engaged with both companies in extensive discussions to try and resolve the issue. However, the Trustee was unable to reach a satisfactory conclusion with either company.
80. The Trustee's legal advisers, Reed Smith LLP, sent a letter to Mr Sayer on 14 June 2010, to notify him that the Trustee was concerned he may not have been properly informed by Abbey Life or Towers Watson of the existence of a GAR under the Policy and, as a result, this might have affected his decision to transfer.
81. Mr Sayer subsequently made his complaint.

Summary of Mr Sayer's position

82. Both Abbey Life and Towers Watson performed an administrative function in relation to the Plan and, on this basis, it is not clear who was primarily responsible.
83. All communications issued by Abbey Life in relation to the policies under the Plan seem to have been designed to apply to the Trustee Investment Plan (**TIP**), where no GAR applied, rather than to the DERP, where a GAR did apply.
84. Had Abbey Life or Towers Watson made him aware of the availability of a GAR at the point when he decided to transfer his benefits from the Plan, he would have retained his benefits in the Plan (and not incurred the 5% commission charged by his IFA).
85. The Equitable Life maladministration was well-established by May 2002, when he transferred his benefits out of the Plan. The value of GARs was, therefore, well-known by this point, and he was aware of the value of GARs. The failure to provide him with information about the availability of a GAR means that he was deprived of the opportunity to consider the transfer of his benefits with this in mind. This fact should be recognised, and he needs to be compensated accordingly by having his GAR benefits reinstated in the Plan.
86. He is unable to locate the document or report received from his IFA, before he transferred out his benefits, giving the advice and reasons why he should transfer. However, neither Abbey Life nor Towers Watson provided any information to him about the application of the GARs under the Plan, and mostly likely his IFA was also unaware of this.
87. Irrespective of Abbey Life's argument that they were never asked whether a GAR applied to the Policy, in any event, regulatory rules prevailing as at May 2002, include the then Financial Services Authority's Conduct of Business (**COB**) Sourcebook. This required Abbey Life to treat their policyholders fairly, take reasonable steps to communicate to them in a way which is clear, fair and not misleading, ensure the suitability of its advice and discretionary decisions and disclose appropriate information.
88. He does not understand how withholding important information, and denying the existence of the GAR for many years, complies with the FSA's requirements.
89. Although Abbey Life dismisses any moral failure as irrelevant, and queries any legal duty, he believes there was a duty of care in tort, and the well-established test in *Caparro Industries v Dickman*. He considers the damages were foreseeable, there is sufficient proximity and it is fair, just, and reasonable in all circumstances to impose a duty of care.
90. There is no equivalent GAR in the arrangement with Winterthur Life. He has not yet taken any pension benefits from Winterthur Life. He estimates the differences between his prospective benefits with Winterthur Life, and the benefits he might

have received with the GAR had he kept his benefits in the Plan, could be in the region of £120,000.

91. To put matters right, he would like his benefits previously with Abbey Life transferred back into the Plan on a GAR basis. An appropriate allowance for investment growth should be applied to his benefits, backdated to the date of his transfer on 22 May 2002.

Summary of Abbey Life's position

92. Records do not demonstrate that final policy documents were sent to the Trustee following SFO approval. However, as an indication of practice, the statement in the sample letters "We will send you a copy of the Rules for your adoption together with the Policy Document as soon as these have been approved" carries weight.
93. Mr Sayer gives no particulars as to the information which his IFA requested as to the Abbey Life product features prior to the transfer payment, and from whom. The implication of his complaint is that no questions were asked of Abbey Life at all. Nor does he set out details of any facts or matters, as to why a duty to provide advice should be owed by the provider (such as Abbey Life) of an insurance product, which constitutes a scheme investment directly to the member of a trust based occupational pension scheme, absent of any request for advice.
94. It has been provided with no facts or legal authority in favour of the existence of a legal duty, owed to members on the part of Abbey Life, to volunteer GAR figures in the absence of any request for information. 'Withholding information' presupposes a duty to provide information, which has not been demonstrated. No request for information appears to be alleged in the case of Mr Sayer, so no complaint of misrepresentation appears to be made. Silence as to matters which there is no duty to disclose can never be an implied representation¹.
95. Any duty to provide information to the member falls on the Trustee, pursuant to the Occupational Pension Scheme (Disclosure of Information) Regulations 1996. Alternatively, on the employer pursuant to the principles in *Scalley v Southern Health & Social Services Board* [1992] 1 AC 294. It is not clear whether any breach of these duties, or delegation of these duties to Abbey Life, is alleged.
96. Mr Sayer's representative appears to be confusing statements made to, or in respect of Mr Sayer on the one hand, and statements made to, or in respect of other members on the other. It does not see how Mr Sayer can found a claim on any correspondence concerning other members.
97. Mr Sayer's IFA asked a question of the employer by letter of 5 September 2000, namely to furnish a current fund value and transfer value. This question was passed on to Towers Watson and by them to Abbey Life, which Abbey Life answered. Nobody suggests this was answered incorrectly. The chain of correspondence exhibits information was sought from Abbey Life from time to time (e.g. in 1991,

¹ Halsbury's Laws of England, Misrepresentation and Fraud [Volume 31 (2003 Reissue)].

1993, 1997 etc). The nature of these requests is unsurprising, given that Abbey Life's role is not that of providing advice, but to provide details of transfer values only (and not the suitability of any resulting transfer). It is also unsurprising that this correspondence does not include requests as to the policy key features – Towers Watson, as the Trustee's agents, should have had a copy of the Trustee's documents relating to the Policy.

98. Abbey Life has not adopted a different stance to Mr Sayer, compared to other members of the Plan. Some members who have received the benefit of the GAR had not transferred out of the Plan. It is not a question of fault, but rather of contractual obligation.
99. Any confusion on the part of Abbey Life as to the presence or otherwise of GARs is irrelevant to the case of Mr Sayer, if no duty arose on Abbey Life to advise as to the presence of the GAR. The GAR was, in any event, extinguished by the transfer.
100. The Trustee knew or ought to have known about the presence of the GAR because they were a party to the Policy. Further, there is no reason at all to suspect this information was not passed on to the administrators, including Towers Watson.
101. It believes the enclosures with its letter of 18 October 1979, and 18 March 1980 (and subsequent letters), would have included documents in the form attached to those letters (i.e. specimen policy conditions, employee benefit illustrations, member's announcement and employers guide). It draws attention to Schedule I of the specimen policy conditions. It is inconceivable that the Trustee would have entered into the Policy without an understanding of what it was entering into.
102. On the alleged breach of the FSA's COB sourcebook, the policyholder is, of course, the Trustee and not Mr Sayer.
103. It considers COB 6.5.20R is quoted out of context; the Trustee is not a private customer (as distinguished at COB 6.1.1R); the Policy is not one of the types of product mentioned in the Rule; the form of 'questions and answers' relates to the process by which the product is acquired (not how it is administered), and the Policy was purchased in 1980, so the FSA rules were not in force.
104. The TIP was not an available product when the Policy was established.
105. The benchmark basis for the GAR is for the pension annuity to be on a single life basis, payable yearly in arrears, guaranteed in payment for 5 years, and non-escalating in payment. The GAR can be taken over a range of ages, not just at normal retirement age. Whilst it is possible to choose a pension annuity on a different basis (e.g. different payment frequency, joint life, different guaranteed period etc) there are no specific GARs which apply when the annuity is taken on a different non-benchmark basis. However, a quote can be done on current Abbey Life rates, on the benchmark basis, and the uplift to provide the guaranteed rate is determined. This uplift is then applied to the requested annuity basis on current immediate annuity rates.

Summary of Towers Watson's position

106. It considers the Plan to be a normal occupational pension scheme, which was governed by its trust deed and rules, and so it would not expect to hold policy documents. The Plan was not a personal pension scheme, with individual policy terms governing the rights of each member, and so there was no need for it to hold the Policy conditions in order to fulfil its role.
107. A link is suggested between the Plan's governing documentation and the Policy, but it does not believe this is the correct analysis. At the time of his transfer, Mr Sayer's benefits were provided for under the Trust Deed and Rules dated 6 April 2000. Rule 15.1 of those rules defined the rights of a deferred member at the time of their retirement which said "the Member's Investment Account shall be realised and the amount of the net proceeds of realisation shall be notified to him and shall be applied by the Trustees in accordance with Rule 10". Rule 10 provides for the member to be given a pension which is to be secured with an (unspecified) insurance company and Rule 20 cover the process of securing the benefit. Prior to retirement, Rule 22 provides the member with a transfer right.
108. Mr Sayer's rights under the 2000 Trust Deed and Rules were to the benefits provided using the value of investment made through the Policy. So, there cannot be any over or under provision because his only rights were to receive the value of his entitlement under the Policy.
109. It provided Mr Sayer with benefits which were entirely in line with the provisions of the 2000 Trust Deed and Rules. It did not need to know the terms of the Policy in order to administer the Plan in accordance with the Trust Deed and Rules.
110. It had a limited role in the administration of the Plan. With regard to the provision of information, it, rather than Abbey Life, communicated directly with Mr Sayer (though it notes Abbey Life did, prior to 2002, correspond directly with other members). However, as Towers Watson did not have access to the details of Mr Sayer's benefits with Abbey Life under the Plan, each time Mr Sayer asked for a statement of his deferred benefits, it had to ask for the relevant figures from Abbey Life. It would then use these figures, as the basis of its response to Mr Sayer.
111. At no stage, prior to the date of Mr Sayer's transfer out of the Plan, did either the Trustee, or Abbey Life, inform it that GARs applied under the Policy – either in general or specifically to Mr Sayer. Indeed, shortly before the date of Mr Sayer's transfer, Abbey Life expressly informed it in relation to another member of the Plan that GARs did not apply under her Policy within the Plan. Towers Watson was not, therefore, in a position to identify that the information from Abbey Life, which was used to provide quotations to Mr Sayer, was incorrect or misleading.
112. As the provider of the Policy, it was the duty of Abbey Life to notify them that Mr Sayer benefited from a GAR. However, Abbey Life did not mention the GAR at all, in any of its correspondence (briefly set out above) with Towers Watson, in relation to Mr Sayer. In summary, it is clear that Towers Watson did not hold information

about the benefits provided under the Policy, Abbey Life did. A referral to Abbey Life was necessary on every benefit query from Mr Sayer.

113. On the issue about knowledge of the GAR, neither Abbey Life, nor the Trustee, gave Towers Watson any information about the potential application of GARs until 7 June 2002, when it was raised by a different IFA in relation to another member. Even after 7 June 2002, there remained considerable confusion at Abbey Life as to whether a GAR applied to policies under the Plan (as demonstrated in correspondence for other Plan members). This confusion continued up until 2007. It considers Abbey Life itself did not believe that GARs applied to Mr Sayer's rights under the Policy at the time of his transfer. It believes this confusion arose from a misunderstanding as to what type of pension arrangement the Plan was (i.e. TIP or DERP). In effect, it seems to them that Abbey Life was using the wrong communication material, i.e. using material for a TIP, which made no reference to GARs as such guarantees did not apply to a TIP.
114. Notwithstanding Abbey Life's failure, it believes Mr Sayer would have decided to transfer his benefits from the Plan, even if he had been notified of the GAR. Its reasons for saying this relate to the correspondence of 21 November 2001, and 18 January 2002. Whilst it is unable to comment on the actual reasons for Mr Sayer deciding to transfer out, the benefits he might receive within the Plan did not appear to be a relevant factor in that decision. This meant that the fact these benefits may have been higher, due to the application of a GAR, will not have impacted on his decision to transfer out. Hence, he has not suffered any loss as a result of Abbey Life's failure to provide the appropriate information about those benefits.

Conclusions

115. Mr Sayer has no direct relationship with either Abbey Life or Towers Watson, although he has a fiduciary relationship with the Trustee. It is the Trustee who has a contractual relationship with both Abbey Life and Towers Watson. Nevertheless, I am able to consider a complaint by a member, such as Mr Sayer, against the administrator(s).
116. The Trustee says it has delegated the administration of the Plan to the respondents. Even so, the Trustee cannot absolve itself from its responsibilities and are ultimately responsible for its agents and the administration of the Plan. So, whilst Mr Sayer has only complained against Abbey Life and Towers Watson, in their capacity as administrators, he could have included the Trustee as well.
117. As an aside, I observe that the Trustee is currently paying its legal advisers to 'help and assist' Mr Sayer with his complaint (and Reed Smith maintain that Mr Sayer is not its client even though it is representing him in these proceedings). At the present time Mr Sayer has chosen not to include the Trustee, and he believes the Trustee has done all it reasonably could in the circumstances to act in his best interests to resolve matters. I have noted the applicant says the Trustee has been helpful, and whether or not the Trustee has a duty of care is not something that I have considered as that is not the complaint before me.

118. Strictly the Plan's Trust Deed and Rules, as opposed to the Policy, governed Mr Sayer's entitlement, as far as his benefits from the Plan were concerned. Nevertheless, when administering the Plan, it may be necessary to know the terms of the Policy in order to know whether the Policy matched the benefits of the Plan, or if there was any under or over provision. I have noted Towers Watson's arguments that under the Plan's Rules that the entitlement is the net proceeds and so no over or under provision can apply in this case.
119. A GAR may apply at the point when a member draws their benefits at retirement. It would not, though, apply during the transfer-out process, but it may be a factor, among several others, to consider when deciding whether or not to transfer out of the Plan.
120. There are many factors that a person needs to weigh up when considering transferring their pension benefits. As part of any consideration, Mr Sayer needed to think about whether or not he would lose any valuable guarantees or benefits.
121. Although Mr Sayer has provided some papers from 1985, 1990, and 1993 relating to his membership of the Plan and this complaint, it is somewhat surprising that he cannot supply his IFA's report giving the advice he received (and relied on), as to why he should transfer out of the Plan.
122. Mr Sayer says that, due to the Equitable Life debacle, the value of GARs was well-known by May 2002. Despite this, there is no evidence that Abbey Life or Towers Watson were asked outright at the time Mr Sayer was considering transferring, whether there were any valuable guarantees, such as GARs. It was always open to Mr Sayer, or his IFA to do so. Whilst Mr Sayer considers that Abbey Life and/or Towers Watson failed to provide him with such information, they were not advising him on the transfer itself.
123. I agree that neither Abbey Life, nor Towers Watson, had any legal duty to Mr Sayer to volunteer information about GARs when transferring out, in the absence of any request for information.
124. Any statutory duty that may result from the Occupational Pension Scheme (Disclosure of Information) Regulations 1996 falls on the Trustee, and the Trustee cannot delegate such a statutory duty to anyone else. But, in any event, the 1996 Disclosure Regulations did not prescribe that GARs needed to be automatically disclosed on transfer.
125. Mr Sayer contends that, had he known about the availability of GARs under the Plan, he would not have transferred away from it. Mr Sayers may now be arguing this point with the benefit of hindsight, in the knowledge that IR limits have been removed from April 2006, and interest rates have declined, particularly since 2008. But I must consider what Mr Sayer may reasonably have done in May 2002.
126. Mr Sayer's benefits under the Plan were invested in the managed funds of Abbey Life and GRE. They would have had a reasonably high weighting to equities. Stock markets had been in decline from 2000 to 2002 as a result of the dot com (telecom, media and technology) bubble bursting towards the end of 1999. This is evidenced

by Mr Sayer's retirement fund reducing from £434,157 at October 2000 to £358,888 at May 2002.

127. In 2002, Mr Sayer could not have known that IR limits would be abolished by the government in 2006 (or whether the Plan would retain or remove such benefit limits within its rules thereafter). As a result, Mr Sayer would likely have proceeded along the lines that his retirement benefits while in the Plan would have continued to be subject to IR (benefit) limits, which were partly based on his length of service. Mr Sayer only had a very short period of company service. Under the Plan, it is the Trustee who controls the investments available to provide the members' benefits. Stock markets ebb and flow, and the over-funding position would have been a potential issue if and when stock markets recovered. Further, the provision of a GAR could possibly make the cost of providing a maximum pension up to IR limits within an occupational pension scheme cheaper, thereby requiring less of his retirement fund.

It is evident from Mr Sayer's email of 21 November 2001, that the over-funding position was a major concern to him at that time. In 2002, the IR restricted contributions to a personal pension rather than the total benefits provided from it. So, moving to a personal pension would remove the potential issue of IR (benefit) limits under the Plan.

128. In view of this, I am not persuaded that, if Mr Sayer had known about GARs within the Policy under the Plan, he would have taken a different course of action. He had taken advice from his IFA, and whilst the IFA's report giving his recommendation is no longer available, there was clearly a good reason for him to transfer. The telephone note of 6 December 2001, suggests this. Indeed, from the evidence available, he could transfer the whole of his retirement fund in 2002 and subsequently use all of it to provide benefits for him in the future.
129. Mr Sayer considers that Abbey Life and/or Towers Watson owed him a duty of care, and they have been negligent by not informing him of the existence of a GAR. He has referred to the case of *Caparro Industries v Dickman*, in which there is a 'three-fold' test. I do not consider that Abbey Life or Towers Watson owed Mr Sayer the duty of care he believes they do. They were not advising him.

130. But, in any event, I do not think he satisfies the test. Mr Sayer was 45½ years old at the time of his transfer in May 2002. He has still not retired now. I do not consider it would be possible, in 2002, to know whether in the future, immediate annuity rates would be better or worse than the GAR at the time he eventually decided to retire. Looking at the first part of the test, it would, therefore, not be reasonably foreseeable to know whether there would be any harm. Further, the third part of the test requires that it must be fair, just, and reasonable, to impose a liability. Given that neither Abbey Life nor Towers Watson were advising Mr Sayer about the transfer of his pension rights, I do not consider it would be fair, just and reasonable to impose such a liability on them.
131. For the reasons set out above, I do not uphold this complaint.

Anthony Arter

Pensions Ombudsman
28 October 2015

Appendix

The Guaranteed Minimum Annuity Rates that applied to policies associated to the Directors & Executive Retirement Plan were as follows:

Minimum Guaranteed Annual amount of Pension per £1000 of Benefit Fund

Retirement Age	Male	Female
50	81.80	76.90
51	83.00	77.80
52	84.30	78.80
53	85.70	79.80
54	87.20	80.90
55	88.70	82.10
56	90.40	83.30
57	92.20	84.60
58	94.10	86.00
59	96.10	87.50
60	98.20	89.20
61	100.50	90.80
62	102.90	92.70
63	105.50	94.60
64	108.20	96.70
65	111.10	99.00
66	114.20	101.40
67	117.50	103.90
68	120.90	106.60
69	124.50	109.50
70	128.10	112.60
71	132.90	115.80
72	137.30	119.30
73	141.80	123.10
74	146.50	127.10

Pensions payable in accordance with this table shall be payable by equal annual instalments in arrears from the date of retirement for the lifetime of the member and guaranteed to be payable for a minimum of five years.