

## Ombudsman's Determination

<b>Applicant</b>	Mrs Diane C Godfrey
<b>Scheme</b>	Paine Webber (UK) Pension Plan (formerly The Blyth Eastman Paine Webber Benefits Plan) <b>(The Plan)</b>
<b>Respondents</b>	Abbey Life Assurance Company Limited ( <b>Abbey Life</b> ), Towers Watson Limited (formerly known as Watson Wyatt and previously the Wyatt Company) ( <b>Towers Watson</b> )

### Complaint Summary

Mrs Godfrey has complained that Abbey Life and Towers Watson failed to inform her, at the time she took her retirement benefits, of the existence of a guaranteed annuity rates (**GAR**) in relation to a policy (numbered 250302020P) (**the Policy**) held on her behalf by the Trustee and providing her entitlement under the Plan.

### Summary of the Ombudsman's Determination and reasons

The complaint should be upheld against Abbey Life and Towers Watson because:

- Abbey Life failed to provide a pre-retirement option letter and subsequent retirement illustration for Mrs Godfrey in accordance with its usual procedures, which it had done for other members of the Plan;
- Towers Watson failed to make proper enquiries as to the benefits provided by the Policy held by the Trustee for Mrs Godfrey's benefit, despite information hinting that a GAR may be applicable. Further, Towers Watson also failed to compare the benefits provided by the existing incumbent insurer under the Policy with benefits provided by other insurers on the open market.

## 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). Mrs Godfrey retired with effect from July 2004, 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).
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 Mrs Godfrey'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 to 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 the members' names for their 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 May 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. Mrs Godfrey's complaint relates to February 2005 (though her pension was backdated to July 2004, when she was aged 60, when she retired under 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.
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...

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. Mrs Godfrey was not listed among the member(s) within the letter of 18 October 1979, having joined before that time. The original letter relating to Mrs Godfrey cannot be located.

31. Abbey Life has also 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 Mrs Godfrey). 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 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 1 DERP policies, the type Mrs Godfrey had, were approved by the Superannuation Funds Office (**SFO**) on 3 August 1982.

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 Mrs Godfrey left the Plan and became a deferred pensioner member in 1980, 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 Mrs Godfrey's retirement from 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) (**the 2000 Deed and Rules**).

42. Rule 15.1 (Pre 3 April 1996 leavers) of the 2000 Deed and Rules says:

“Subject to Rules 15.3 and 15.4 in the event that an Employed Member leaves Service prior to Normal Retirement Date the Trustees shall hold the Member’s Investment Account until his Normal Retirement Date at which date the Attributable Assets applicable to 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”.

43. Rule 10 (Benefits at Normal Retirement Date) of the 2000 Deed and Rules provides:

“10.1 On an Employed Member’s retirement at Normal Retirement Date the Attributable Assets applicable to his 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 to provide for or in respect of the Member such of the following benefits (within the limits contained in the Appendix) as the Member shall elect –

...

10.1.2 a personal pension payable to the Member from the date of his retirement in the manner specified in Rule 23 subject to the requirements of the Board of the Inland Revenue and the indexation requirements of section 51 of the 1995 Act.

...

10.2 A pension or contingent pension provided under this Rule shall be secured with an Insurance Company in accordance with Rule 20”.

44. Rule 20 (Securing benefits under insurance policies) of the 2000 Deed and Rules says:

“20.1 Subject to the requirements set out in Rule 20.3 below, where benefits (whether immediate, deferred or contingent) are payable under the Plan to or in respect of any person (in this Rule called a ‘Beneficiary’), the Trustees may purchase or provide in the name of the Beneficiary or in the name of a trustee for the benefit of the Beneficiary or may assign to the Beneficiary or to the trustee a policy with an Insurance Company providing benefits (whether immediate, contingent or deferred) in substitution for the benefits which would have been payable under the Plan”.

45. 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.



46. 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.”

47. 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 make a claim.

### **Material Facts**

48. Mrs Godfrey joined Paine Webber International (UK) Limited on 3 July 1978, and the Plan on 1 September 1978. The Company paid contributions in respect of her at a rate of 10% of her salary. In addition, a transfer payment of £2,135.43 was paid into the Plan from the White, Weld & Co Incorporated Pension and Life Insurance Scheme, along with £500 of surplus funds.

49. Abbey Life says it issued the Policy to the policyholder, i.e. the Trustee, for Mrs Godfrey’s benefit.

50. Mr Godfrey left the Company and the Plan on 1 March 1980.

51. On 25 February 1990, Mrs Godfrey wrote to Abbey Life requesting the then value of her pension under the Plan, and also the ‘buy out’ value for annuity purposes. She also asked Abbey Life to let her know “anything else which may be an option to me ...”.

52. Abbey Life prepared a benefits statement on 7 April 1990, quoting a current fund value of £15,176 and transfer value of £12,420. It also gave a (‘LAUTRO’) projection of benefits assuming pre / post retirement growth rates of 8.5% / 8.0% (lower illustration), and 13% / 10% (higher illustration). Abbey Life issued this statement to Mrs Godfrey on 11 April 1990.

53. Mrs Godfrey has requested and received similar information from Abbey Life at other times. For example, Mrs Godfrey’s letter of 23 September 1991; Abbey Life’s reply of 26 September 1991; Abbey Life’s correspondence of 11 October 1991; Abbey Life’s letter of 19 March 1992; and Abbey Life’s correspondence of 10 July 2001.

54. Mrs Godfrey telephoned Abbey Life on 22 August 2001, then aged 57. She asked for projected benefits at the ages of 58, 59, and 60.
55. Abbey Life provided illustrations to Mrs Godfrey on 29 August 2001, based on the Personal Investment Authority's pre-retirement growth rates of 5% and 9%. Abbey Life also asked Mrs Godfrey to complete a 'Retirement Questionnaire', and said it was important she sent it this information, so Abbey Life may ensure that it did not pay more tax-free cash and pension than allowed by the Inland Revenue.
56. On 29 April 2002, Abbey Life sent a facsimile message to Towers Watson for another member of the Plan (Mrs N), confirming that, as this was a Trustee Investment Plan and not a pension, GARs did not apply.
57. Towers Watson sent a facsimile message to Abbey Life on 10 June 2002, saying:  
"I understand from our telephone conversation on Friday 7 June 2002 that your Legal Dept have now confirmed that guaranteed annuity rates do in fact apply to the above Plan and subsequently could benefit Mrs N. You have previously confirmed by facsimile on 29 April 2002 that guaranteed annuity rates did not apply.  
  
I should therefore be grateful if you could arrange for a quotation to be produced for Mrs N based upon your guaranteed annuity rates ...".
58. On 28 May 2002, Towers Watson sent a letter to Mrs Godfrey via the Benefits Agency because it did not hold her address. A handwritten note on that letter (presumably by Mrs Godfrey) said "Wrote 28/6/02 & told them where I now live".
59. UBS AG, parent company of Paine Webber International (UK), sent Mrs Godfrey a benefit statement in September 2002. This showed the Trustee held 692.778 capital units and 1,529.957 accumulator units in Abbey Life's Managed Fund for Mrs Godfrey. The then current fund value was £33,036.
60. On 27 January 2004, Abbey Life sent a letter to Towers Watson. Abbey Life noted that Mrs Godfrey was due to retire on 25 July 2004 (her chosen retirement date), and said the Trustee was required to provide details of the member's retirement options at least six months prior to their retirement date. To help Abbey Life prepare for the member's retirement, it asked for the completion of a 'Company Pensions Retirement Questionnaire' within 30 days. It also said:

**"Timetable of events**

1. If you confirm that the member wishes to take retirement benefits, or do not respond to this letter, then a Retirement Pack will be sent 3 months prior to the chosen retirement date.

...

***Retirement Options***

...

**Option 2 – Buying an annuity from Abbey Life**

...

If the member intends to retire on the chosen retirement date, we will send you an illustration of the anticipated benefits 3 months before this date. The illustration will detail how the benefits could be taken.

..."

61. As well as the questionnaire, there was also a leaflet that accompanied Abbey Life's letter headed 'Important Information about Open Market Options'. Among other things, the leaflet said:

**"Why should I consider taking the Open Market Option?"**

As with most things, shopping around can get you a better deal. ...

...

Before shopping around make sure you understand what you already have:

If you take an Open Market Option, you will not be able to benefit from any Guaranteed Minimum Annuity Rate, if applicable, that you may have under your Abbey Life plan".

62. Towers Watson replied on 13 February 2004, in relation to Abbey Life's request for pre-retirement information. In its letter to Abbey Life, Towers Watson said:

"Please note that as we are the administrators of the Plan, we will be providing the member with full details of the retirement benefits including those invested with Abbey Life. Hence there is no more action for you to take".

63. Towers Watson telephoned Abbey Life on 8 and 11 June 2004. Telephone notes of those calls records that Abbey Life confirmed the fund value as £35,308.11 on 8 June, and a concern about over-funding. Abbey Life confirmed the contributions for 1978/79 (£3,885) and 1979/80 (£937). It was agreed that Abbey Life would perform a full unit check and validity check.

64. On 21 June 2004, Abbey Life told Towers Watson:

"As promised I have done a breakdown of contributions paid and units allocated for Mrs Godfrey.

Contributions paid were £3885.47 in the year ending May 1979 and £500 special in the year ending May 1980.

...

I have found an old Certificate of Paid Up Benefits showing an estimated projected fund of £37,064 which does seem to tie in with the current value.

I have also calculated our usual reasonableness check and Mrs Godfrey's fund does pass this check".

65. On 1 July 2004, Towers Watson wrote to Mrs Godfrey about her forthcoming retirement on 25 July 2004, aged 60 (the Plan's normal retirement age). An illustration was provided by Towers Watson. Based on a fund value of £35,308.11 and 'average' annuity rates, Towers Watson estimated Mrs Godfrey's pension to be £1,384.08 a year, or a tax-free cash sum of £703.13 and smaller pension of £1,356.52 a year. The pensions increased in payment by 3% per annum, and there was a 50% provision for a spouse's pension.
66. Mrs Godfrey was asked to complete three forms to enable Towers Watson to approach the 'open market' for annuity quotes.
67. Mrs Godfrey sought assistance from a friend, Mr B King (**the Adviser**). The Adviser queried the amount of tax-free cash sum, since it was only based on Mrs Godfrey's service from September 1978 to March 1980, and did not take account of the transfer payment and associated qualifying service for IR limits. Additional information was provided, including Mrs Godfrey's past history prior to joining the Plan.
68. A certificate of paid-up benefits, dated 2 June 1980, was amongst the additional information sent by the Adviser to Towers Watson on 27 July 2004. This certificate quoted estimated benefits at normal retirement date, which included a projected retirement fund of £37,065.44 and stated this would provide a minimum guaranteed personal pension payable for five years and life thereafter of £3,306.24 a year in arrears. Based on the female GAR at age 60 – see Appendix – this appears to have been calculated as  $£37,065.44 / 1,000 \times 89.20$ .
69. Towers Watson contacted Abbey Life on 4 August 2004, seeking further information about the transfer-in payment. Abbey Life responded on 11 August 2004, giving a copy of the correspondence it held.
70. On 18 August 2004, Towers Watson wrote to the Adviser saying the information from Abbey Life was insufficient, and it would be contacting Merrill Lynch (who had taken over White, Weld & Co) to see if they could provide further information.
71. The Adviser also queried the maturity value and investment returns relating to the surplus funds of £500, of which Mrs Godfrey had received a share.
72. On 20 October 2004, Towers Watson wrote to the Adviser answering the queries previously raised. Revised retirement figures were included for Mrs Godfrey. Based on a fund value of £36,861.87 and average annuity rates, Towers Watson estimated Mrs Godfrey's pension to be £1,467.10 a year, or a tax-free cash sum of £6,328.13 and smaller pension of £1,218.82 a year. The pensions were assumed to increase in payment by 3% per annum, and there was a 50% provision for a spouse's pension.
73. Correspondence ensued between the Adviser and Towers Watson surrounding figures linked to the £500 made on 20 June 1979. Towers Watson liaised with Abbey Life on 19 November 2004.
74. On 25 January 2005, Abbey Life says it issued a transfer value quotation to Towers Watson. The current fund and transfer values were both shown as £38,496.01 as at 31 December 2004. The important notes on the quotation said:

“2. Please note that if you take a Transfer Value or Open Market Option, you may not be able to benefit from the Guaranteed Minimum Annuity Rate that you may have under your Abbey Life Plan”.

75. On 8 February 2005, Towers Watson spoke to the Adviser and Abbey Life. The telephone note records that Abbey Life said the confusion about the £500 invested and advised as £314.50 would have been the transfer value. The current value of the £500 was £869.11, and the overall value of the Policy was £39,530.53.
76. Towers Watson reiterated this information about the £500 to the Adviser.
77. In a letter to Towers Watson dated 9 February 2005, Mrs Godfrey confirmed that she wanted to take the maximum tax-free cash sum of £6,328.13, and use the balance of her retirement fund to secure a single-life pension, which was non-escalating in payment and guaranteed for five years. Mrs Godfrey completed Towers Watson's forms on 11 February 2005, verifying the basis of her pension.
78. Abbey Life says a payment of £40,020.24 was made on 7 March 2005.
79. On 14 April 2005, Mrs Godfrey wrote to Abbey Life, as she was concerned about the delay. Mrs Godfrey acknowledged there had been complications, but she had completed forms on 11 February and been told by Towers Watson that it had passed all papers to Abbey Life.
80. Abbey Life sent a 'withdrawal advice' form via Towers Watson for Mrs Godfrey and the Trustee to complete. Mrs Godfrey completed the member's declaration on the form on 18 April 2005 and returned it to Towers Watson.
81. On 3 June 2005, Towers Watson wrote to Mrs Godfrey saying it had received £40,020.24 from Abbey Life. After paying the tax-free cash sum of £6,328.13, the remaining £33,692.11 would be used to purchase an annuity.
82. After completing an open market review, Towers Watson outlined three 'competitive' annuity providers (Canada Life, GE Life, and Norwich Union) to Mrs Godfrey, and asked her which insurer she wanted the Trustee to secure her annuity with. Mrs Godfrey replied on 19 June 2005, confirming she had opted for a pension from Canada Life.
83. The sum of £33,692.11 was paid to Canada Life. Canada Life issued a policy on 30 June 2005, and the annuity was backdated to 25 July 2004. Mrs Godfrey was provided with an annuity of £1,938.24 per annum. This annuity was payable monthly in advance, did not increase in payment, and was guaranteed for five years and life thereafter.
84. As part of this investigation, Abbey Life was asked what annuity it would have provided. Abbey Life has confirmed that a sum of £33,692.11 at 7 March 2005, would, on the same non-benchmark GAR basis as Canada Life and payments backdated to 25 July 2004, have secured an annuity of £2,809.72 per annum.
85. P60s produced by Canada Life for Mrs Godfrey for the tax years ending 5 April 2006, 2008, and 2009, show she was a basic rate taxpayer in those years.

86. Towers Watson has provided a telephone note recording the outcome of a call on 18 April 2006, in which Abbey Life was asked whether there were GARs attached to the policy. The heading of the note is 'availability of GARs' and appears to be non-member specific. The note records Abbey Life confirmed that there were not.
87. On 8 June 2006, the Head of Customer Relations at Abbey Life wrote to one of the Trustee Directors confirming this confusion at Abbey Life. In that letter, Abbey Life stated "*I believe perhaps there has been some confusion amongst staff between the Trustee Investment Plan and the Directors and Executive Retirement Plan, which is our unit-linked money purchase occupational pension scheme and shares the same range of policy numbers*".
88. 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.
89. Abbey Life sent a letter to the Trustee on 26 April 2007, stating "*We confirm that the above scheme is a Directors and Executive Retirement Plan. The scheme drafts and adapts its own rules, is treated as if it is part of the Trustee Investment Plan. Guaranteed Annuity Rates applies to all members of the scheme that take benefits with Abbey Life*". Further, the letter goes on to state that "*the surrender documentation does not mention Guaranteed Annuity Rates as these are for Trustee Investment Plans*".
90. The Trustee's legal advisers, Reed Smith LLP (formerly Richard Butler), says when the Trustee 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 respondent during 2008 and 2009.
91. In its letter to Reed Smith dated 4 July 2008, Abbey Life said it had investigated the position, on the application of the GAR, in relation to the list of members that Reed Smith had provided. Abbey Life produced three schedules, marked A, B, and C. Schedule A listed four members (including Mrs N), who took an annuity with Abbey Life and received the relevant GAR benefit. Schedule B listed 28 members, who had taken retirement benefits with another insurer after being provided with an illustration indicating a GAR was quoted. Schedule C listed 18 members, who required further investigation. Abbey Life said, these 18 members had taken their benefits with another insurer, but may not have been informed of the loss of their GAR benefits. Mrs Godfrey was not included on any of the three schedules.
92. In a letter addressed to Reed Smith LLP dated 12 June 2009, Abbey Life said there was evidence that a flyer was included in the transfer value quotation pack issued on 25 January 2005 to Towers Watson for Mrs Godfrey. The flyer contained the following warning:

"Before shopping around make sure you understand what you already have:

- If you take an Open Market Option, you will not be able to benefit from any Guaranteed Minimum Annuity Rate, if applicable, that you may have under your Abbey Life plan”.

93. Abbey Life also pointed out the transfer value quotation itself also gave a warning at note 2 (see paragraph 68 above).
94. Reed Smith LLP sent a letter to Mrs Godfrey on 14 June 2010, to notify her that the Trustee was concerned she 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 her decision at retirement.
95. Mrs Godfrey subsequently made her complaint.

### **Summary of Mrs Godfrey's position**

96. She has become aware that other members of the Plan were given an occupational pension scheme retirement pack by Abbey Life. The retirement pack issued on 4 February 2003, for another member (Mr S) of the Plan said:

#### “Retirement Illustration

In our pre-retirement illustration information letter to you we asked you to start thinking about the options available at retirement and outlined what those options were. One of the options is to buy an annuity from Abbey Life. We said that we would send you an illustration to show how much income an Abbey Life annuity would pay each year; the illustration is enclosed.

The illustration is just an example and is prepared to give you an idea of the amount of income an Abbey Life annuity would pay each year subject to Inland Revenue limits.

It is prepared on the following basis:-

...

- If minimum Guaranteed Annuity rates apply to this policy, the pension figures quoted are based on those rates”

97. Critically, neither Abbey Life, nor Towers Watson, alerted her that there was an applicable GAR benefit, or showed the value of that benefit. In particular, neither Abbey Life, nor Towers Watson, provided her with a pre-retirement option letter and/or subsequent retirement illustration of her benefits from the Policy on the basis that the GAR applied. For example, no mention is made of a GAR in the retirement illustration which Towers Watson sent to her on 1<sup>st</sup> July 2004.
98. The mention of GARs in the flyer was only generic and certainly not adequate to alert members to their rights. The flyer does not state that there is a GAR in relation to the Policy; it merely contains generic language. There is nothing that suggests to her that she actually had the benefit of a GAR. Something more than a passing, generic

reference in a flyer which primarily discussed the Open Market Option would have been needed to put her 'on notice' that a GAR applied to her benefits.

99. 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.
100. Had Abbey Life or Towers Watson made her aware at the point when she decided to take her benefits from the Plan of the availability of a GAR in relation to her prospective annuity policy she would have taken the GAR over the Open Market Option.

### **Summary of Abbey Life's position**

101. 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. A letter from the SFO to Abbey Life dated 23 November 1983, however, casts doubt on when the final prints were made available.
102. Mrs Godfrey gives no particulars as to the information (if any) which she or her Adviser requested as to the Abbey Life product features prior to pursuing the market annuity option. No request for information appears to be alleged in the case of Mrs Godfrey, so no complaint of misrepresentation appears to be made.
103. The implication of her complaint is that no questions were asked of Abbey Life at all. Nor does Mrs Godfrey set out details of any facts or matters, as to why a duty to provide advice should be owed directly to the member of a trust based occupational pension scheme 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.
104. Mrs Godfrey makes no reference to the transfer value quotation dated 31 December 2004 which was sent to Towers Watson on or around 25 January 2005, and, assuming she received the same, gives no explanation as to why she ignored and/or made no enquiries in response to the warning in that quotation at note 2.
105. There is an assertion, without particulars, or authority, by Towers Watson, that Abbey Life was responsible for providing information relating to that part of Mrs Godfrey's benefits under the Plan which was held by Abbey Life. There is a further assertion, again, without particulars, or authority, that a duty arose each time Towers Watson requested details of Mrs Godfrey's benefits under the Plan. Mrs Godfrey complains that she was not informed of the availability of a GAR at the time she decided to take her benefits from the Plan in July 2004. As previously stated, Mrs Godfrey gives no details as to the information which she or her Adviser requested as to the Abbey Life product features prior to the purchase of an annuity.



106. It is simply not understood how a duty can be imposed on Abbey Life to answer a question which it was not asked. Silence as to matters which there is no duty to disclose can never be an implied representation<sup>1</sup>.
107. 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.
108. A scheme insurer – which is, of course, operating at arm's length from the scheme Trustee – does not owe any duty to volunteer information which has not been specifically requested. A duty to disclose in relation to an insurance contract is limited to a duty on the proposed insured (not the insurer) to disclose relevant facts during the negotiating process: *Moens v Heyworth* [1842] 152 ER 418 at 157-158.
109. Any confusion on the part of Abbey Life as to the presence or otherwise of GARs is irrelevant to the case of Mrs Godfrey, 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 purchase on an open market annuity.
110. It is not open to Mrs Godfrey or Towers Watson to criticise Abbey Life on the basis that, had it been asked to provide information, it would have given wrong information (which seems to be the implication in the material from Towers Watson about knowledge of the GAR).
111. Nor is it open to Towers Watson to criticise Abbey Life on the basis of an argument that, had Abbey Life not been confused as to the facts, it would have volunteered information which it was under no duty to provide, and which would have drawn attention to the existence of the GAR. Any liability on the part of Abbey Life (which is in any event denied) is required to be established on the basis of a misrepresentation or non-disclosure in breach of duty. A misrepresentation would need to be established by reference to authorities which established a legal duty to disclose.
112. 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.
113. Towers Watson admits that it was on notice as to the potential application of a GAR by 7 June 2002, significantly before Mrs Godfrey chose to purchase an open market annuity. Had Towers Watson wished to clarify the scope of the GAR, it could have asked for further information.
114. It does not suggest that Towers Watson requested any such information. In particular, Towers Watson apparently did not make any enquiries following receipt by them, on or around 25 January 2005, of the transfer value quotation referred to above, which

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

document put Towers Watson on further enquiry as to the possibility of a GAR in Mrs Godfrey's case.

115. Towers Watson, as the Trustee's agents, should have had a copy of the Trustee's documents relating to the Policy.
116. It believes the enclosures with their 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 they were entering into.
117. The TIP was not an available product when the Policy was established.
118. 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 rates.

### **Summary of Towers Watson's position**

119. It opposes the allegations made against it by Mrs Godfrey on the grounds that:
  - Abbey Life was responsible for providing information relating to Mrs Godfrey's benefits under the Plan which were held by Abbey Life;
  - Abbey Life failed to inform them that GARs applied to Mrs Godfrey's benefits with Abbey Life. Any failure by them to refer to such guarantees in communications with Mrs Godfrey was not, therefore, through any fault or maladministration on the part of them;
  - The failure of Abbey Life to refer to the guarantees in communications relating to Mrs Godfrey's benefits was due to the considerable confusion at Abbey Life as to what type of pension arrangement the Plan was, and whether GARs applied to it. It was not conclusively aware that guarantees applied to the Plan until Hargreaves Lansdown confirmed this was the case at a trustee meeting held on 21 September 2006 – more than two years after Mrs Godfrey's retirement.
120. In view of the reasons in the immediate paragraph, Mrs Godfrey has not suffered any injustice in consequence of maladministration in connection with any act or omission of Towers Watson.
121. As Towers Watson did not become involved in the Plan until 1990, it does not know who held the original policy documents issued by Abbey Life.

122. From a review of the correspondence, there is no evidence it received a copy of the Policy conditions until these were sent over by Abbey Life on 25 September 2006.
123. 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. It would, therefore, not have considered it necessary to obtain a copy of the Policy itself.
124. Towers Watson only has a copy of the Trust Deed and Rules relating to the Plan dated 6 April 2000. It believes it would have been provided with a copy of the then current trust deed when it was appointed to the Plan, but cannot locate a copy of any such deed and does not generally retain copies of historic scheme documents.
125. The 1979 Rules have been mentioned. It does not see how these have any relevance to Mrs Godfrey's complaint. The 1979 Rules no longer had any validity in relation to the Plan. Whilst in some cases old rules might be stated to continue to apply to members who had already left service, this is not the case in relation to the Plan. The 2000 Deed and Rules replaced the previous rules in their entirety, and at the time of her retirement, Mrs Godfrey's benefits were provided for under these latest (2000) rules.
126. It had a limited role in the administration of the Plan – certainly until 2002.
127. Given this limited role in the administration of the Plan, it was not necessary for it to have a detailed understanding of the operation of the Policy with Abbey Life, as it was entitled to rely on Abbey Life providing complete and accurate information about the benefits to which members were entitled.
128. A link has been made between the Trust Deed and Rules, and the Policy. It does not believe it is the correct analysis of Mrs Godfrey's rights under the Plan, or of the obligations on it when administering the Plan, to say "it would be necessary to know the terms of the Policy in order to know whether the Policy matched the benefits under the Plan, or if there was any under or over provision".
129. Rules 15.1 in the 2000 Deed and Rules defined Mrs Godfrey's rights at the time of her retirement, 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. Mrs Godfrey's rights were to the benefits provided using the value of the investment made through the Policy. There cannot be any over or under provision because her only rights were to receive the value of her entitlement under the Policy.
130. It provided Mrs Godfrey with benefits which were in line with the provisions of the 2000 Deed and Rules. It did not need to know the terms of the Policy in order to administer the Plan in accordance with the legal documents of the Plan.

131. It did exactly what the 2000 Trust Deed and Rules required. It may be that these rules were not particularly appropriate where a member has rights to a GAR with the provider of the investment in which her Investment Account was held. But it cannot see it has carried out maladministration for providing benefits in line with the 2000 Deed and Rules.
132. It just needed Abbey Life to provide complete and accurate information about Mrs Godfrey's entitlement under the Policy so that it could apply that entitlement in accordance with the 2002 Trust Deed and Rules.
133. There is no evidence to support a conclusion that it failed to take steps which "would have averted this situation". It may be true that if it had pushed the question of GARs more in Mrs Godfrey's case, Abbey Life would have realised its error. Nonetheless, the evidence actually suggests the opposite. Abbey Life was entirely confused about whether GARs applied, as set out in the communication events below.
134. When the Plan was initially set up, it believes communication with Mrs Godfrey was led by Executive Benefit Services Limited. That company appears to have simply forwarded information produced by Abbey Life and such communication should have included reference to any applicable GARs. Subsequently, up until around 2002, Abbey Life appears to have communicated directly with Mrs Godfrey. Abbey Life provided details of Mrs Godfrey's benefits under the Plan, including benefit projections. It was the duty of Abbey Life to notify Mrs Godfrey of the existence of the GARs in these circumstances.
135. Mrs Godfrey was sent a letter in 1978 from Executive Benefit Services Limited which enclosed an estimate of benefits under the Plan prepared by Abbey Life. This document refers to a "Guaranteed Pension" and refers to a "Guaranteed Basis current rate of income 11½%". It is unclear whether this is actually a reference to the GARs. It notes that this is the same information which led Mrs N (through her financial adviser) to raise the issue of GARs in 2002. However, unlike Mrs N, Mrs Godfrey and her 'adviser' did not appear to have picked up on the reference to these guarantees.
136. The correspondence between Mrs Godfrey and Abbey Life in September 1991, March 1992, and August 2001, provide illustrations of retirement benefits. It is unclear whether the projection pension was calculated based on the GAR, but there is no express reference to a GAR.
137. From sometime around 2002, it took over direct communication with Mrs Godfrey. However, as it did not have access to the details of Mrs Godfrey's benefits with Abbey Life under the Plan, at every stage it had to ask for the relevant information and figures from Abbey Life. It would then use the information and figures as the basis of its response to Mrs Godfrey.
138. As the provider of the Policy, it was Abbey Life's duty to notify them that Mrs Godfrey benefitted from a GAR.
139. 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). On 18 April 2006, it telephoned Abbey Life seeking confirmation of whether a GAR applied under the Policy and it was told at that time a GAR did not apply.

140. It does not believe there is any significance in the interchangeable use of “policy” and “plan”. From Abbey Life’s perspective, the Policy and the DERP (or TIP) were the same. That does not necessarily mean that the policy applies to all members of the Plan, or to all the benefits of those members, or that the same policy’s terms and conditions applied to all members with Abbey Life benefits.
141. The fact that GARs applied to one member did not necessarily mean that every member of the Plan would have a GAR. This depended on the applicable policy conditions in force on the date the member started a policy. It is common for insurers to change guarantee terms from time to time and to withdraw guarantees for new joiners. Indeed it notes that under the Plan different policy terms applied to different groups of members, as set out in the letter from Abbey Life dated 25 September 2006. Until it received this letter, Towers Watson did not have sufficient information, on a member by member basis, to determine whether the GAR applied to members other than Mrs N.
142. This confusion continued up until 2007. It considers Abbey Life itself did not believe that GARs applied to Mrs Godfrey’s rights under the Policy at the time of her retirement. 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. It believes this is the root cause of the problem.
143. It notes Abbey Life appears to accept that their communications should have referred to the GARs, where applicable. In its letter of 4 July 2008, Abbey Life refers to a list of members in Schedule B confidently asserting that those members had received an illustration which indicated that a GAR was quoted. Abbey Life go on to state that “Where these policyholders and their advisers were put on notice of the fact that there was an applicable GAR benefit, we do not consider there is any claim against Abbey Life”. It accepts that position. If the information provided by Abbey Life had referred to the GARs, Towers Watson would have carried out its duties by including that information in the communications with Plan members and the members would have been fully aware of the existence of the GARs.
144. However, the assertion that the illustrations quoted GARs proved to be incorrect on further investigation of a number of the listed cases, nor was it correct in the case of Mrs Godfrey. Reed Smith emailed Towers Watson on 2 February 2009, following a conversation that Reed Smith had had with Abbey Life. In that conversation, Abbey Life had said that it seemed it may have set up the Plan account inaccurately in terms of the documentation that was generated.

145. Abbey Life's explanation for the failure to provide this information (given in their letter of 12 March 1999) is that the problem "seems to have arisen due to the bespoke nature of the Plan, and the way in which it was recorded on our systems". In other words, the problem was entirely caused by Abbey Life. By not providing information about the GARs, Abbey Life failed to fulfil its duties to the Plan and its members.
146. It believes that had Abbey Life used the correct communications for the DERP, those communications would have alerted Towers Watson to the existence of the GAR, and that information would have been passed on to Mrs Godfrey. The fact that Abbey Life appears to have set up the Plan incorrectly on its systems actually suggests that any further enquiry by it about the existence of GARs for Mrs Godfrey would, in all likelihood, have been met with the response that they did not apply (as happened in 2006 albeit in relation to another member). Without reference to GARs in these communications it had no way of knowing that a GAR applied to Mrs Godfrey and had no duty to make further enquiries of Abbey Life in that respect. It therefore does not consider that it can in any way be said to have caused Mrs Godfrey's loss, and so should not be held liable for that loss or any resulting inconvenience.
147. Its role at the time of Mrs Godfrey's retirement was to obtain details of a member's benefit preferences (e.g. in relation to increases in payment and survivor benefits), and then approach the open market so as to provide three quotations to the member. These quotations were obtained on behalf of the Plan, in accordance with arrangements with the Trustee. Mrs Godfrey selected the annuity quotation from Canada Life. Towers Watson implemented that selection on behalf of the Plan, acting as a "post box", forwarding instructions, completed forms and certificates to Abbey Life and Canada Life.
148. As part of the process, Tower Watson's market review would have considered the annuity rate offered by Abbey Life. However, as Abbey Life had not notified them of the presence of the GARs, the standard annuity terms offered by Abbey Life would have been considered. These would not have been the most competitive, and so were not one of the three options put to Mrs Godfrey.
149. Had it been informed of the existence of GARs by Abbey Life, it would have compared the annuity under the Open Market Option with the annuity available from Abbey Life. Abbey Life failed to make any reference to this valuable benefit in correspondence with them in relation to Mrs Godfrey, and so they were not aware of the need to raise the GAR with Mrs Godfrey. It agrees that if Abbey Life had told it about the GARs, Mrs Godfrey would, through its review, have secured an annuity with Abbey Life taking advantage of the GARs. The cause of Mrs Godfrey's loss was, therefore, Abbey Life's error.
150. It does not consider its actions amount to maladministration and, even if it were, it does not see how such a proposed award of £1,000 can be justified in this case, particularly when added to the sum which Abbey Life may be awarded to pay.
151. The Courts – *Haywood v Westminster City Council* [1997] 2 All ER 84 (**the Haywood case**) refers – have indicated that awards of this size, as in this case, should only be in exceptional circumstances. It does not consider such an award to be appropriate because:

- Mrs Godfrey has had little direct involvement in her complaint. She was contacted by the Trustee about the issue and the Trustee's legal advisers have led her complaint without cost to her. She has suffered little in the way of personal inconvenience.
- It does not consider it had within its power the ability to resolve this complaint at an earlier stage, without intervention by the Ombudsman.
- Whilst it accepts Mrs Godfrey has suffered a long delay in receiving the higher income she should have been entitled to in the period since her retirement, it does not believe that it can be criticised for that delay. It has always responded promptly and comprehensively to enquiries in relation to this complaint.
- It does not see any basis for it to pay twice the level of compensation compared to Abbey Life. Even if Abbey Life is directed to make up the shortfall in Mrs Godfrey's annuity, this is not an additional liability for Abbey Life. It always had a liability to put an annuity into payment taking into account the GARs, and would have done so if it were not for its own maladministration. Thus, Abbey Life is not being penalised for topping up Mrs Godfrey's annuity beyond its own contractual obligation.

152. Mrs Godfrey's situation is not an isolated case in relation to the Plan so it is important that full consideration to its comments is made even if those points appear to have no direct impact on the conclusions in Mrs Godfrey's case.

## Conclusions

153. Mrs Godfrey has no direct relationship with either Abbey Life or Towers Watson, although she 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 Mrs Godfrey, against the administrator(s).

154. 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 is ultimately responsible for its agents and the administration of the Plan. So, whilst Mrs Godfrey has only complained against Abbey Life and Towers Watson, in their capacity as administrators, she could have included the Trustee as well.

155. As an aside, I observe that the Trustee is currently paying its legal advisers to 'help and assist' Mrs Godfrey with her complaint (and Reed Smith maintain that Mrs Godfrey is not its client, even though it is representing her in these proceedings). At the present time, Mrs Godfrey has chosen not to include the Trustee, and she believes the Trustee has done all it reasonably could, in the circumstances, to act in her 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.

156. Abbey Life has made reference to *Scalley v Southern Health & Social Services Board* [1992] 1 AC 294. I have not considered this case, as Mrs Godfrey's employer is not a party to her complaint.

157. Strictly the Plan's Trust Deed and Rules, as opposed to the Policy, governed Mr Godfrey's entitlement, as far as her 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 argument that under the Plan's Rules the entitlement is the net proceeds and so no over or under provision can apply in this case.
158. Accordingly, Towers Watson submits that, as the Plan has to be administered in accordance with its Trust Deed and Rules, it was not necessary for it to obtain details of the Policy to administer the Plan. However, Towers Watson also submits, conversely, that it needed Abbey Life to provide complete and accurate information. Whilst the Trustee and the administrators need to administer the Plan in accordance with the Trust Deed and Rules, I disagree that it was not necessary for it to know the terms and conditions of the Policy. Towers Watson, as the Trustee's agent, arranged a review of the annuity market ahead of the Trustee securing Mrs Godfrey's benefits in line with her wishes. Towers Watson has to take responsibility for that review, and its shortcomings in not asking Abbey Life to quote an annuity for Mrs Godfrey under the Policy which her fund could provide. So, in order to administer Mrs Godfrey's benefits on behalf of the Trustee properly, Towers Watson did need to satisfy itself of the terms and conditions of the Policy.
159. The liability of the GAR originally fell on Abbey Life, as part of the contractual terms of the Policy with the Trustee.
160. I have noted that Towers Watson says it only has the Trust Deed and Rules dated 6 April 2000, and does not hold historical deeds. Had it done so, rule 17(b) of the 1979 Rules would have indicated that the Policy may have valuable guarantees, since in the past the Trustee discretion to secure benefits under other policies with other insurers was subject to the proviso that the benefits were no less than the benefits from the Policy. That might imply there was some guarantee. Obtaining historical Plan documentation is, at least, best practice in order to understand the past workings of the Plan and ensure subsequent amendments have been validly made so that the plan is administered on the correct basis. The failure to do so was a missed opportunity. In some instances, it might amount to maladministration.
161. 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 its statutory duty to anyone else.
162. Abbey Life has argued its position from a legal perspective. In particular, it says there are no legal disclosure requirements for it to comply with, and sets out its stance when it may have certain duties, such as responding to requests made to it. Nonetheless, the area of maladministration can cover far wider issues.



163. From the evidence presented, it seems that Abbey Life's usual procedures were to issue a pre-retirement letter informing members of their options, some months ahead of their normal retirement date. It also appears that Abbey Life followed-up that letter with a retirement pack, about three months before a member's normal retirement date.
164. The retirement pack letter dated 4 February 2003, admittedly for another member of the Plan, says that if minimum GARs applied then the pension figures quoted would be based on those GARs.
165. If a retirement pack had been issued to Mrs Godfrey, then any illustration included within it ought to have factored in a GAR according to Abbey Life's standard letter. It has been argued, though, that Abbey Life's illustrations were not, in fact, based on the GARs. What information was provided to other members is not relevant to Mrs Godfrey's complaint. What is relevant to Mrs Godfrey, is whether or not Abbey Life followed its normal administrative procedure. If it did, then it ought to have issued her with a retirement pack and illustration, which ought to have been on GAR terms. If Abbey Life did not issue a retirement pack, or it did but the illustration did not, in fact, take account of GARs, then it would be at fault.
166. There is no evidence that Mrs Godfrey was issued with a retirement pack. Indeed, Towers Watson appears to have told Abbey Life to take no action. Abbey Life's failure to follow its normal procedures would normally amount to maladministration. But, since Abbey Life has produced no evidence it issued her with a retirement pack and illustration, there is no need to consider what it may or may not have said.
167. In mitigation, Abbey Life has referred to the transfer value quotation it issued to Towers Watson on 25 January 2005. Clearly this quotation, and any flyer that accompanied it, does at the very least hint that a GAR may apply. Abbey Life has noted, though, Mrs Godfrey has made no reference to that quotation. Indeed, of the papers submitted surrounding Mrs Godfrey's retirement, Towers Watson has not referred to that fund or transfer value in any of its communications with her. So, there is no evidence Towers Watson received that quotation, let alone Mrs Godfrey.
168. I find that it was maladministration by Abbey Life to not definitely confirm that a GAR did apply to the Policy when quoting figures for Mrs Godfrey at her retirement.
169. Nevertheless, I do not hold Abbey Life entirely at fault. Towers Watson accept it was on notice as to the potential application of GARs by 7 June 2002, but that it did not conclusively know GARs applied until 21 September 2006. Towers Watson refers to the non-member specific enquiry of 18 April 2006, to demonstrate that there was still ongoing confusion about GARs under the Plan / Policy at that time.
170. However, in the discussions Towers Watson had with Abbey Life on 10 June 2002, it is stated that GARs applied to the Plan. The context of that facsimile is that GARs applied to the Plan per se, rather than a particular policy.

171. Notwithstanding the above, Towers Watson has pointed out, though, that the fact a GAR may have applied under one member's policy does not necessarily mean it applied under another. I accept that position. On that basis, Towers Watson could not rely on Abbey Life's general annuity rate when carrying out its review of the open market. It would have been necessary to actually ask Abbey Life, as the incumbent insurer, to quote retirement benefits from the Policy for Mrs Godfrey.
172. But the evidence before me is that Towers Watson did not ask Abbey Life specifically for details of the benefits Abbey Life would provide for Mrs Godfrey, even though Towers Watson accepts terms and conditions can vary between members. So, what Towers Watson may have been told for other members in 2002 and 2006, could not be completely relied upon. Towers Watson argues that the evidence suggests if it had asked whether a GAR applied under the Policy for Mrs Godfrey, it is likely Abbey Life would have told it that no GAR applied. But, in my view, what it may have been told is somewhat speculative.
173. Towers Watson should have at least asked. Had Abbey Life misrepresented the position about Mrs Godfrey's benefits Towers Watson may have had some protection. But in view of the past confusion in 2002 with Mrs N, it would have been necessary to establish the contractual terms and conditions and, in my view, the only way to confidently do so would be to obtain the Policy document relating to Mrs Godfrey.
174. In the absence of Abbey Life issuing a quotation, the failure to ask Abbey Life for a quotation of the pension benefits it would provide under the Policy was, therefore, also maladministration by Towers Watson.
175. Further clues about a GAR applying to the Policy holding Mrs Godfrey's benefits also appear to have been overlooked. In July 2004, Towers Watson was sent a copy of the certificate of paid-up benefits, signed by the Trustee, that Mrs Godfrey had been issued with on leaving in 1980. Although the projected retirement fund of £37,065.44 was based on assumed rates of return, this projected fund was stated to provide a minimum guaranteed personal pension of £3,306.24 per annum. Again, this strongly implies a GAR. Given the issues that Towers Watson had experienced with other members, it should have been more robust with Abbey Life, as to whether or not a GAR applied to Mrs Godfrey under the Policy.
176. As the annuity of £2,809.72 per annum that Mrs Godfrey could have received on the non-benchmark GAR terms is greater than her existing annuity of £1,938.24 per annum, she has suffered financial injustice equivalent to £871.48 per annum.
177. Had Abbey Life quoted the retirement benefits that the Trustee could have secured under the Policy at the time of Mrs Godfrey's normal retirement date, in accordance with its standard procedures, or told Towers Watson of the GAR when quoting retirement figures, I am satisfied that Mrs Godfrey and Towers Watson, on behalf of the Trustee, would have elected for Abbey Life to provide Mrs Godfrey's pension.

178. I have considered how any liability for the identified maladministration and resulted injustice should be apportioned. I have taken into account the fact that the contractual liability was always with Abbey Life, and it did not issue the appropriate retirement documentation at the time of Mrs Godfrey's normal retirement date. Further, Towers Watson has contributed to this position by not taking suitable and prudent administrative steps which would have averted this situation. These steps include obtaining the Policy particulars, and asking Abbey Life what benefits might be secured in the absence of receiving Abbey Life's usual retirement quotation. I, therefore, make suitable Directions below.
179. Towers Watson has commented on the amount of distress and inconvenience. My views follow. The Haywood case came to the High Court in 1996 and the Court of Appeal in 1997. Originally, the Judge was not persuaded that to pay £1,000 was so excessive as to be wrong in law. But when the case was considered at the Court of Appeal, the Ombudsman's directions were set aside. Part of the reasoning for this was to do with jurisdictional aspects, and the contention that arrangements (such as compensation schemes) which had some form of connection or association with pension schemes might properly form the basis of an investigation by the Pensions Ombudsman. Nevertheless, comments were made by the Court of Appeal concerning the level of distress and inconvenience.
180. Mr Haywood received payments totalling £1,580 in excess of those to which he was lawfully entitled, and he was not asked to repay them. The Judge went on to say that, whether or not Mr Haywood could have been compelled to repay them was neither here nor there; but in his judgment, given the value which the Pensions Ombudsman placed on distress and inconvenience (which no one had challenged), the overpayments which Mr Haywood received had fully compensated him for any disappointment which he may have suffered by reason of the Council's handling of his entitlement to retirement benefits.
181. Mrs Godfrey's case is distinguishable from the Haywood case. An individual fortunate enough to be overpaid cannot be said to suffer the same sense of injustice when the payments are reduced to the amount actually due to him, as a person who is denied a payment actually due to him. In this case, Mrs Godfrey has been underpaid her benefits, as opposed to being overpaid. Further, inflation has considerably reduced the value of compensation since 1996, so comparing a similar value today with that of many years ago is flawed.
182. Mrs Godfrey has had the inconvenience of having less income than she ought to have had over the past decade. It was Towers Watson who went ahead and arranged an annuity, albeit with Mrs Godfrey's consent, with Canada Life (as opposed to with Abbey Life) on the Trustee's behalf. The amount of compensation for distress and inconvenience reflects both the failure to administer the member's benefits, albeit payable from the Policy, and the considerable length of time which Mrs Godfrey has been denied her benefits.

## **Directions**

183. I direct that, within 28 days, Abbey Life shall:

- pay Mrs Godfrey £7,603 (i.e. £9,585.84 less an amount for income tax at the basic rate of tax) which represents the net amount she should have received from 25 July 2004 to 24 July 2015, had her gross income been £871.44 per annum more than it was;
- calculate and pay Mrs Godfrey an amount of interest, at the rate of interest quoted by the reference banks, due on the net pension arrears of £7,603 between the date each monthly pension instalment was due up to the date of payment;
- set up a non-escalating annuity, payable monthly in advance, to pay Mrs Godfrey £871.44 gross per annum, subject to income tax, from 25 July 2015 onwards for her lifetime.

184. Further, within 14 days of this determination, Abbey Life and Towers Watson shall each pay Mrs Godfrey £750 for the inconvenience caused to her, and in particular for the loss of enjoyment of her income for the past eleven years.

**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.