

PENSIONS ACT 2004, PART 2 CHAPTER 6
APPEAL TO PENSION PROTECTION FUND OMBUDSMAN
DETERMINATION BY THE DEPUTY PENSION PROTECTION FUND
OMBUDSMAN

Applicant : Mr C Suchett-Kaye of Reynolds Porter Chamberlain LLP, on behalf of the Trustees of the NASUWT Managed Pension Plan (**the Trustees**)
Scheme : NASUWT Managed Pension Plan (**the Scheme**)

The Deputy Pension Protection Fund Ombudsman has received a reference of a reviewable matter, following a decision by the Reconsideration Committee (**the Committee**) of the Pension Protection Fund (**PPF**), dated 24 August 2010. The referral concerns the Scheme's risk-based levy for the year 2009/10.

Grounds for referral by the Trustees

1. The Scheme's risk-based levy in respect of the period 1 April 2009 to 31 March 2010 should have been calculated on the basis that the Scheme benefited from a Type B(ii) contingent asset, thereby altering the assessment of the underfunding risk U.

Background

2. On 30 March 2009, the Trustees submitted certification of Type B(ii) (real estate) contingent assets which included a valuation of a property (**the Conference Centre**) and a formal legal opinion in relation to the contingent asset.
3. On 19 October 2009, the Board wrote to the Trustees and said that the Scheme had not satisfied the Board's requirements for recognition of the contingent asset because the property had been valued on a market value basis rather than on a vacant possession basis and the qualifications to the legal opinion were inconsistent with the opinion given.
4. The Scheme levies for the period 1 April 2009 to 31 March 2010 were set out in an invoice dated 30 October 2009.

5. On 24 November 2009, the Trustees submitted an application to the Board requesting a review of the levies. Supporting information included a letter from their legal advisers, dated 20 November 2009, clarifying the statements made in the original legal opinion and a statement in Appendix A that “GVA Grimley have confirmed to us...that [the] valuation was carried out on a vacant possession basis and...represents its open market value”.
6. The Board reviewed their original decision but upheld the calculation of the levy and issued its Review Decision on 7 May 2010. On 24 August 2010 the Committee reached its Reconsideration Decision to uphold the Review Decision and the original calculation of the levy.

Response by the Reconsideration Committee

7. In respect of comments regarding the Committee’s decision the Committee responds that the Trustees had requested reconsideration of the Scheme levy for the period 1 April 2009 to 31 March 2010, as set out in an invoice dated 6 November 2009. They acknowledge this was a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004.
8. The Board published its final determination of these matters for the financial year 2009/10 on 20 November 2008 (**the PPF Determination**).
9. The Board notes that reconsideration of the amount of the levies is a reconsideration of the amount of the levies in a particular case and not a reconsideration of the PPF Determination under Section 175(5) (of the Pensions Act 2004). The scope of the reconsideration is whether the calculation in respect of the Scheme's levy invoice was carried out in accordance with the published PPF Determination. Neither the Committee nor the Board had any discretion to depart from the PPF Determination.
10. The contingent asset in question was Type B(ii)(a charge over real estate). The Committee considered that the requirements of the contingent asset certificate had not been complied with. In particular, the contingent asset certificate required the Trustees to provide a valuation of the property on a market value basis except where land, which is occupied by the chargor, any of the employers covered by the security, or any associate of them, the valuation should be on a

- vacant possession basis. It was declared on the contingent asset certificate that the property is occupied but the valuation supplied is on a market value basis.
11. The risk based levy was calculated by reference to the formula $U \times P \times R \times c$, subject to a cap (K) equal to 0.01, multiplied by the Scheme's protected liabilities, (paragraphs 18 to 20 of the Schedule to the PPF Determination).
 12. The terms "market value" and "vacant possession" can be used by valuers in a number of different ways. The valuation report, though, clearly assesses the Conference Centre on the basis that it is occupied by working businesses.
 13. The covering letter included with the valuation explicitly confirms that the Centre has been valued as a "fully operational and equipped trading entity." Therefore the contingent asset certificate could have been rejected on this basis alone.
 14. The further issue identified when reviewing the contingent asset is the legal opinion. Annex C to the PPF Determination requires that, in respect of Type B(ii) contingent assets, the security agreement submitted "creates a legal first priority legal mortgage or fixed charge in favour of the trustees." The legal opinion however states that this cannot be confirmed at paragraph 10.14. Given the existence of this qualification the Committee took the view that the contingent asset was correctly disregarded.
 15. Given that the contingent asset did not meet the requirements of having submitted all the correct documentation prior to 31 March 2009, the Trustees would be reliant on the Committee exercising discretion in the Scheme's favour for the contingent asset to be accepted taking into account the further documentation provided.
 16. At review stage the Trustees submitted further information as to the valuation basis and also provided a letter seeking to remedy the legal opinion. The Committee considered whether the certificate could be accepted by virtue of exercise of any of the discretions in the PPF Determination but decided to uphold the original calculation of the levies.

Discretions

17. The Committee found that the discretion available to it under paragraph 5 of the Schedule did not apply because the Schedule has made provision to enable a calculation of the levy to be performed in respect of the Scheme.
18. The Committee considered the discretion available to it under paragraph 6 of the Schedule which states that nothing in the PPF Determination shall prevent the Board from reviewing the amount of the levies calculated in respect of a scheme, where among other things, it subsequently appears to the Board that the information upon which the calculation was based was incorrect in a material respect. The clarificatory information was not provided as part of the contingent asset submission in advance of the deadline. Therefore, the original contingent assets submission was correctly rejected and the information on which the invoice was based is not materially incorrect.
19. There appears to be no basis on which the Board may exercise discretion under paragraph 12 of the Schedule, which enables the Board to take such steps as it thinks fit to obtain further information for the purposes of the calculation. Had the supplementary legal opinion and valuation been provided before the Scheme was invoiced this might have given rise to the possibility of paragraph 12 being used to take into account that further information, but the further information was provided at review stage (the supplementary legal opinion was dated 20 November 2009).
20. Paragraph 13 was not relevant as the Board had such information as was necessary under the terms of the PPF Determination to calculate the invoice in this case.

Written representation from the PPF Board

21. In addition to the points made by the Reconsideration Committee, the Board state that their position remains that the Scheme's levy invoice was calculated correctly in accordance with the terms of the PPF Determination for 2009/10.
22. Paragraph 12 only applies where the Board had decided levies should be recalculated on the basis of another provision of the Determination, most commonly the paragraph 6 discretion.

23. The paragraph 6 discretion can be applied at any time after a scheme's levy has been calculated if the Board considers that the information was materially incorrect. If the Board is of the view that a scheme's contingent asset has been incorrectly rejected it is open to it to find that the information used to calculate that scheme's levy was incorrect because it did not include provision for a contingent asset which met the Board's criteria. It would then go on to consider whether the paragraph 6 discretion should be exercised in all the circumstances.
24. In the Scheme's case, had the supplementary legal opinion and clarificatory valuation information been supplied to the Board prior to the calculation of its levy, the paragraph 12 discretion would have arisen and the Board would have had to consider whether to exercise the discretion in all the circumstances.
25. Since the additional information was not provided until the Reconsideration stage, the use of that information was dependent on there being some other reason for the scheme's levy to be recalculated. The Board decided that the paragraph 6 discretion did not arise in the circumstances and that there was no basis for recalculation. The paragraph 12 discretion did not therefore arise for consideration at that stage.

Further representation from the Board

Valuation

26. "Vacant possession" is not a defined term in the RICS Red Book. A valuation on that basis is understood to be based on "the assumption that the property is transferred unencumbered by the owner's occupancy i.e. that the buyer is entitled to full legal control and possession." The requirement for valuations on a vacant possession basis where the secured real estate is occupied by the sponsoring employer or related entity is intended to reflect that a diminution of value of the property can be expected in the event of an insolvency of the sponsoring employer, as, at the point of insolvency, the value of the occupying business is unlikely to be realisable.

27. In valuing the Conference Centre, the valuers have sought to identify the price which a hypothetical willing purchaser would pay in an arm's length transaction on the valuation date. This "hypothetical sale" approach is consistent with the RICS Red Book definition of "market value".
28. The valuation states that the valuers have assumed that the Conference Centre is "fully operational and equipped", that "the chattels are owned as visible on site with no hire purchase, leasing or rental agreements in place" and that "trade fixtures, fittings, furniture, furnishings and equipment are included".
29. The fact that the trade equipment and other chattels are assumed to be left on site at the time of the hypothetical sale means that vacant possession, as ordinarily understood, would not be given. In *Cumberland Consolidated Holdings Ltd v Ireland [1946] KB 264* the Court of Appeal held that:

"Subject to the rule de minimis a vendor who leaves property of his own on the premises ...cannot...be said to give vacant possession, since by doing so he is claiming a right to use the premises for his own purposes, namely as a place of deposit for his own goods inconsistent with the right which the purchaser has on completion to undisturbed enjoyment."
30. The valuation is therefore not on a "vacant possession basis" because the assumed presence of the trade equipment and chattels means that vacant possession would not be given in the hypothetical sale. If the Conference Centre were to be sold on the basis the valuer has assumed, any obligation in the sale contract for the seller to give vacant possession would have to be qualified by reference to the continued presence of the trade equipment and other chattels.
31. The valuation assumes that the Conference Centre will continue to trade right up until the hypothetical sale date and does not make allowances for the possibility of it being vacant and therefore not trading in the period leading up to the hypothetical sale. In these circumstances the value which may be generated from a sale of the Conference Centre could well be significantly less than in a straightforward open market sale.

32. It is not always the case that trade related property is “usually” valued on a basis which takes account of plant, equipment, trade fixtures, fittings, furniture and furnishings. The RICS Red Book indicates that:

“the closure of a business, and removal of some, or all, of the trade equipment may have a significant effect on the value of the property. It will, therefore, often be appropriate to express the value on the basis of one or more special assumptions, as well as on the basis reflecting the status quo. This is often a requirement when advising a lender as to the value of trade related property for loan security purposes...In these cases the typical assumption will be “Market value of the empty property having regard to trading potential...”

33. If the valuer had valued the Conference Centre on the basis of “Market Value of the empty property having regard to trading potential”, which would have been consistent with the RICS Red Book Guidance that could properly be called a “vacant possession” valuation.

34. Paragraphs 3.1 – 3.5 of the RICS Red Book sets out two alternative valuation methods, and it is evident that the method of valuation required by the Determination must have been one of those. The two methods are:

“(a) where a property is trading, it should be valued on the basis of its “Market value as a fully equipped operational entity having regard to trading potential” (paragraphs 3.1 – 3.2), or

(b) where a business has closed and all or some of the trade equipment has been removed, the property would be valued on the basis of the “Market Value of the empty property having regard to trading potential (paragraphs 3.3 – 3.5).”

It is clear that in valuing the Conference Centre the valuers followed method (a) whereas it is clear that in requiring a valuation to be undertaken on a “vacant possession” basis the Guidance was calling for method (b) to be used on the basis that “Vacant” and “empty” are analogous terms, and it is method (b) that refers to an empty property. By definition, a property where trading is currently taking place, as contemplated by method (a), cannot be said to be “vacant” and it is evident from the context that this must be the appropriate method of valuation. The whole purpose of the PPF, and of the levy which finances it, is to make provision against the risks of employer insolvency. The purpose of requiring a particular approach to valuation in such cases is to ensure that the

- valuation does not assume a solvent occupier continuing to trade, when that is unlikely to be the reality.
35. No other approach would make commercial sense. Method (b) above is intended to apply where the occupying business has closed, as opposed to method (a) which applies where a property is currently trading. The valuer's action in valuing the charged property on the basis of it being a fully operational trading entity is inconsistent with the purpose of this provision. The issue has nothing to do with whether it was proper to take into account the trading potential of the property. The question is whether it was right for the valuation to assume the property was occupied by a fully equipped and operational trading entity.
 36. The Board has significant concerns over the accuracy of the Valuation. The Board has discussed the position with another firm of valuers and notes that Valuation does not explain how the £6.25 million figure has been derived. In general terms a valuation of £6.25 million does not appear justifiable in circumstances where, at the valuation date the economy and the property market were in a woeful state. Their alternate valuer has also commented that the multiplier used appeared extremely high.
 37. The Committee interpreted Annex C to the Determination in a manner which was properly open to it and the Committee's decision cannot be overturned simply on the basis that the PPF Determination or guidance ought to have been clearer. It is in any event an overriding requirement of the PPF Determination that a Contingent Asset may only be taken into account "to the extent that it appears to the Board to have [the effect of reducing the risk of compensation being payable from the Fund]." It is plain that the Board could not have properly recognised the full purported value of a Type B(ii)E contingent asset if it considered that that purported value overstated the reduction in risk.

Legal Opinion

38. A legal opinion for levy reduction purposes is required to address specifically matters of priority and due registration of security over interests in real property. In making a levy determination the Board is required to determine

- whether there are adequate grounds for the applicant stating that the security in question is a valid and effective first ranking security interest. It is for this reason that the form of legal opinion required by the Board is not a standard form of transactional legal opinion. The qualifications contained in the legal opinion letter are inappropriate as they go to the heart of the legal opinion being sought and undermine the opinion being given and, accordingly, the certification.
39. It is not appropriate simply to take a standard precedent for a “transactional” type of opinion and attempt to apply that to a context where different or additional statements of legal opinion are required to be made. Where, as in a typical domestic financing transaction, statements of legal opinion as to whether a document is legally binding, valid and enforceable are all that is asked for, it is quite “standard” to include qualifications to the effect that no opinion is being given as to the ranking of any security. The legal opinion letter fails to take account of the context of the opinion and of the statements of opinion that are required to be made in the context of a PPF contingent asset submission. Paragraph 9.4 of the legal opinion letter correctly makes a statement of legal opinion, regarding the priority of the security in question. This is however nullified by qualifications in paragraphs 10.14 and 10.15 and by assumption as to title contained in paragraph 8.10.
 40. It is an express requirement of the PPF Determination that, for there to be a valid contingent asset of this kind there must be a certificate confirming that the security agreement creates a first priority legal mortgage or fixed charge, not subject to any *pari passu* security interest, and that this confirmation must be given on the basis of a legal opinion. This requirement cannot be satisfied where the opinion confirms that the legal advisers are expressing no opinion about those very matters.
 37. The Guidance in relation to Contingent Assets (v4, November 2008) states at paragraph 2.7.1 that the qualification contained in paragraph 10.26 of the opinion may be inappropriate where the opinion has confirmed that the charge has been properly registered (which it does at paragraph 9.2).

38. In order to make the required statement of opinion in paragraph 9.4 – that the security is a first ranking mortgage and not subject to any prior interests – the lawyer giving the opinion must carry out the requisite searches at the Land Registry (and if relevant at Companies House). Those searches will allow the lawyer to make a statement as to title and as to priority of the security granted.
39. Paragraphs 8.10, 10.14, 10.15.1 and 10.26 renders the statement of opinion contained in 9.4 completely valueless and results in the opinion not satisfying the key requirements of the levy determination process. The person who drafted the legal opinion letter has not correctly considered the context in which they have been required to issue an opinion.

Further representation from the Trustees

Valuation

40. The Trustees have provided further comments from the firm who valued the Conference Centre as follows:

“Extract for RICS Practice Statement GN 67/2010

“Freehold and leasehold interests in licensed properties are freely, bought, sold and let, in the open market, either as fully equipped operational entities offered with vacant possession, or as investments”

This property was not valued as an investment by GVA but on the basis of vacant possession ...

GVA has used the approved method of valuing a trading entity as set out by the RICS:

“Market Value – the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion .”

When the hypothetical sale of the property completed the purchaser would be given vacant possession of the property by the vendor i.e. the vendor would not remain in occupation and would not leave any personal belongings on site.

...common sense would point to the fact that our valuation assumed that there will be vacant possession as the vendor will not remain on

site and all trade equipment and chattels would be sold to the purchaser. The case used in [further representation from the Board] implies that the vendor retained ownership of the goods he was leaving on site. The market value within our reports includes the Fixtures & Fittings (F&F).

We were not asked to provide a valuation on the special assumption that the business would be closed, no accounts would be available, the licences were lost or in jeopardy and the F&F had been removed. There is a significant difference between the concept of vacant possession and a business which is closed, not trading and stripped of F&F.

The statement “should the conference centre be sold by the beneficiaries of the charge following enforcement of the contingent asset security” points to the fact that the Board think that the property should have been valued on the assumptions set out above (closed, stripped, no accounts.) We agree that the Market Value based on this special assumption (as described above) would be less than the Market Value of the property as is (i.e. open and trading as a fully as a fully equipped operational entity). However the instructions from our clients NASUWT did not ask us to provide a Market Value on this basis.

We agree with the first part of the statement but NOT with the extract used. This is misleading as the extract actually says:

“Also the closure of a business, and removal of some, or all, of the trade inventory may have a significant effect on the value of the property. It will, therefore, often be appropriate to express the value on the basis of one or more special assumptions, as well as on the basis reflecting the status quo. This is often a requirement when advising a lender as to the value of trade related property for loan security purposes. *It does not follow that the differences between this special assumption and the value reflecting the status quo represents the value of transferable goodwill and the valuers should not indicate any such apportionment. For example the differences could reflect the costs and time involved in removing the fixtures and purchasing new equipment.* In these cases the typical assumption will be “Market value of the empty property having regard to trading potential...”

The section before the above extract from the Red Book states:

“3.3 Where the property is empty either through cessation of trade or it is a new property with no existing trade to transfer, different assumptions are made. For example, an empty property may even have been stripped of all or much of its trade equipment, (or a new property may not have the trade equipment installed), but it could still be valued having regard to its trading potential.”

This last paragraph is important and confirms that it is correct to have regard to the trading potential of a business even if the trading inventory has been removed.

GVA's valuation does not state that the inventory has been removed, in fact it states specifically that the property is "fully equipped" on a number of occasions throughout the report. There appears to be some confusion from the Board as to the difference between removal of the trade inventory and vacant possession.

We were not asked to value the property on an "empty basis". The instruction was confirmed by GVA stating:

"We will base the valuation on market value if the property were placed on the open market rather than its Existing Use (what the property is worth to your organisation as an operational entity)."...

..the basis of the valuation is on the assumption of a REO [Reasonably Efficient Operator] having run the business, i.e. a stabilised valuation with a FMT [Fair Maintainable Trade] of £1.9 million and an EBITDA [Earnings before Interest, Tax, Depreciation and Amortisation of 33% and a multiple of 10 giving £6 million which is then discounted by 10% to reflect the risk an REO would be taking on in trying to achieve the assumed FMT. This reduced the MV [Market Value] to £5.4 million. To this figure the MV of the offices at £780,000 and the land at £100,000 was added giving a MV of £6.28 million which was rounded down to £6.25 million..."

Legal Opinion

41. Without a form of opinion being set out in the regulations the Trustees cannot see the difference between a "transactional" opinion and any other type of opinion that the Board are trying to argue would be applicable. There are no specified forms of legal opinion attached to or referred to in the Guidance in relation to Contingent Assets (Nov 2008) Guidance – even the suggested forms of acceptable/non-acceptable wording in Appendix 3 of the Guidance are expressed not to be exhaustive or intended to cover all contingencies. The Guidance does state that:

"The principal purpose of the opinion is to provide comfort to the trustees as to the binding, valid and enforceable nature of the contingent asset, and the other matters set out in the opinion, which go to the potential value to the scheme of the contingent asset."

So long as the opinion fulfils that objective it should qualify to support the evidence of the contingent asset arrangement.

42. Opinions in similar form to the legal opinion letter have been delivered to trustees of other pension schemes and the Board before March 2009 and have been accepted by the Board subject to further clarification. RPC not only consulted Practical Lending and Security Precedents (2008) but also based the opinion letter on a template drafted for type B(ii) contingent asset security by [a firm of pensions lawyers].
43. Paragraph 10.15 of the opinion letter makes no sense unless read as if it were part of paragraph 10.14. Paragraph 10.15 became a separate paragraph solely as a result of a clerical formatting error.
44. Searches and enquiries were carried out during the process of giving the certificate of title. The Board seem to have ignored that this was the case and that there is no requirement for this certificate to be addressed to the Board or for the Board to be able to rely on it.
45. The drafting of paragraph 10.26 of the legal opinion, other than the inclusion of the word “broadly”, is expressly described as the drafting that “may be considered inappropriate” in the Guidance. There is no reason why this should have any detrimental effect on the value of the opinion. If the security has been registered correctly (as the opinion states) then the mischief of being void against a purchaser for value cannot occur.
46. There is no prescribed form of opinion. Unless the “irrelevant boilerplate” drafting affected “the binding, valid and enforceable nature of the contingent asset, and the other matters set out in the opinion, which go to the potential value to the scheme of that contingent asset” then it should not matter for the purposes of the Board whether it was included or not.

Conclusions

47. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004. The reviewable matter in question is the amount of the risk-based levy required of the Scheme for the financial year 2009/10.
48. Under Section 175(5) of the Pensions Act 2004, the Board was required to determine the factors by reference to which the 2009/10 levies were assessed; those factors were set out in the PPF Determination. The Board has correctly submitted that the PPF Determination, itself, is not a reviewable matter, nor is the Board able to amend the PPF Determination on an individual application for review or reconsideration.
49. My role, in very simple terms, is to determine if the Board has acted correctly here. Established case law indicates that I may only interfere with the exercise of a discretion where the decision-maker (in this case the Board) has failed to follow one or more of the following principles:
 - it must ask itself the correct questions;
 - it must direct itself correctly in law;
 - it must not arrive at a perverse decision, taking into account all relevant matters and no irrelevant matters.
50. In this context, perverse is taken to mean a decision which no reasonable decision-maker, properly advising itself, could arrive at.

Valuation

51. There is a clear disagreement between the Board and the Trustees, and the Trustees' advisers, as to the manner in which a trade related property such as the Conference Centre should be valued such that the valuation is considered to be on a vacant possession basis.
52. Annex C to the PPF Determination provides that if, for the purposes of security over real estate, the property is occupied by the Chargor then the property or relevant part must be valued on a vacant possession basis. Otherwise the property must be valued on a market value basis. Annex C also states "For these

purposes ‘vacant possession’ and ‘market value’ shall have the meanings given to them in the RICS Red Book” and concludes that “What constitutes a valuation for these purposes shall be determined in accordance with the contingent asset guidance published by the Board.”

53. It is clear from the following extracts, taken from the RICS Red Book, that valuations for trade related properties are considered differently to other types of property. In particular, that a trade related property such as a conference centre is typically valued with vacant possession but on a trading basis with all trade fixtures and fittings included. Paragraphs 2.2 and 2.3 of the RICS Red Book state:

“2.2 Trade related property

Property with trading potential such as hotels, fuel stations, restaurants or the like, the Market Value of which may include assets other than land and buildings alone. These properties are commonly sold in the market as operating assets and with regard to their trading potential. Also called property with trading potential.

2.3 Valuation of the operational entity

The assessment of the value of the operational entity will usually include:

- The legal interest in the land and buildings;
- The plant & equipment, trade fixtures, fittings, furniture, furnishings and equipment;
- The market’s perception of the trading potential, excluding personal goodwill, together with an assumed ability to obtain/renew existing licences, consents, certificates and permits and
- The benefit of any transferable licences, consents, certificates and permits.

Consumables and stock in trade are normally excluded.”

54. The guidance published by the Board states that “The Board will not be issuing a prescriptive set of rules in relation to valuations and certificates of title. The Board has set out certain requirements in Annex C to the Determination. As with legal opinions, the Board will be relying on trustees and their advisers to obtain valuations and/or certificates of title which the trustees believe give appropriate comfort in the interests of their members...”

55. Thus the “guidance” given to trustees in Annex C is to obtain a valuation in accordance with the contingent asset guidance which states that requirements are set out in Annex C. The only requirement clearly stated by the Board is that ‘vacant possession’ and ‘market value’ shall have the meanings given to them in the RICS Red Book. It follows that where, as appears here, guidance might be unclear then the Board cannot easily have been said to have “asked the right questions” or “considered only relevant and not irrelevant factors”. If, as the Board maintain, a vacant possession valuation must be carried out in a particular manner, this should be made clear in the contingent asset guidance notes or in Annex C to the PPF Determination and the reasons issued about why an asset has been refused recognition would then be far clearer than they are here.
56. This appears to be supported by the fact that during my consideration of this issue a range of issues have been debated between the Trustees’ expert valuers and the Board. Further the Board has sought to introduce new reasons for refusing the contingent asset, explicitly that an expert valuer whom they have consulted has cast doubt on the accuracy of the Trustees expert valuer’s opinion.
57. It is not my role to decide which approach to valuation is appropriate here. I also recognise that at base the Board has a discretion about whether to take any contingent asset into account. As I am however unable to reconcile the Board’s approach here with the guidance they issued about valuations I cannot say all relevant and no irrelevant matters have been taken into account and for this reason consider the matter should be remitted back to the Board for their reconsideration.

Legal Opinion

58. The Trustees submit that qualifications concerning priority are typically found in English legal opinion concerning security to allow for the, albeit unlikely, possibility that unknown rights, held by a person before the creation of a charge and which do not appear in searches, nonetheless may impact upon the charge. The precedent for this is contained in the Practical Lending and Security Precedents – October 2008 edition. Paragraph 6(U) sets out the specific

reservations to be included in legal opinion concerning security and these mirror the qualifications set out in paragraph 10.14 of the legal opinion letter dated 23 March 2009.

59. Given that the Board say their reason for refusing to exercise discretion here was because “especially where the main criterion has not been met (the valuation)...” I consider again the Board should be requested to reconsider this case. Put differently, it seems from the Board’s reasoning that the perceived valuation difficulties impacted on the exercise of discretion as regards the legal opinion, therefore it is not clear to me that even if the valuation had been acceptable the legal opinion alone would have resulted in the contingent asset not being recognised therefore I must ask the Board also to reconsider the legal opinion once they have reconsidered the valuation.

The Committee’s Decision

60. As previously stated, it is not my role to decide, on what basis the valuation was carried out or whether the legal opinion was drafted in the correct form. My role is to consider whether the Reconsideration Committee’s decision “was not reached correctly”.
61. Whilst I accept that in the latter part of this investigation the Board provided detailed explanations as to their reasoning behind the rejection of the Scheme’s type B(ii) contingent asset certificate at the outset when they made their decision their communications were, in my view, unclear. At that time the Committee told the Trustees that “The valuation supplied...appears to be on a market value basis” and “The terms “market value” and “vacant possession” can be used by valuers in a number of different ways.” In connection with the legal opinion, they simply said “The qualifications to the legal opinion appear inconsistent”. In my judgment the initial communications with the Trustees, and the Committee’s decision were unclear and the reasoning inadequate as to why the valuation was considered not to have been carried out on a vacant possession basis and the qualifications to the legal opinion inconsistent.

62. In addition, I am somewhat concerned that the Board have sought to introduce wholly new arguments during the course of this investigation. In particular, about the scope of the valuation and additional concerns about the legal opinion letter. These are matters that ought properly to have been advised to the Trustees at the outset. As noted this clearly indicates that not all relevant matters were considered at the appropriate stages by the PPF.
63. For the reasons given above I find that it would be unsafe to proceed on the assumption that proper consideration was given by the Committee when reviewing the application made by the Trustees on 24 November 2009. In particular that the Committee failed to take into account all relevant matters.
64. Accordingly, I determine that the Reconsideration Committee's decision of 24 August 2010 was not reached correctly.
65. Having done so, Regulation 16 of The Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005 makes it mandatory for me to determine what action the Board should take and remit the matter to the Board.
66. I remit the matter to the Board with the direction that it should revoke and, having taken all relevant matters into account, replace the Reconsideration Committee's decision with a new decision.

JANE IRVINE

Deputy Pension Protection Fund Ombudsman

23 July 2012