

Ombudsman's Determination

Applicant	Action for Children Pension Trustee Limited
Scheme	Action for Children Pension Fund
Respondent	The Pension Protection Fund

Summary of the application

The Ombudsman has received a reference of a reviewable matter, following a decision by the Reconsideration Committee of the Pension Protection Fund (**PPF**) dated 15 May 2013. The referral concerns the calculation of the Scheme's risk-based levy for the levy year 2012/13, which is a reviewable matter under paragraph 19 of Schedule 9 of the Pensions Act 2004.

Background

1. The reference concerns the calculation of the Scheme's risk-based levy for the levy year 2012/13. In particular, it concerns the decision by the Board of the PPF (the Board) not to accept re-certification of a Contingent Asset.
2. Schemes are able to take certain steps to reduce their risk-based levy. One of these is submitting a Contingent Asset Certificate to the Board. The relevant rules covering Contingent Assets were set out in Part G of the Determination issued by the Board on 13 December 2011 (the **Determination**), together with a Contingent Asset Appendix (the **Appendix**). There are three types of Contingent Asset. The referral concerns the submission of a Type B Contingent Asset on behalf of the Scheme. A Type B Contingent Asset is "a security in Acceptable Form" which complies with paragraphs 8 to 11 of the Contingent Asset Appendix and Rule G2.3. The reference to being in Acceptable Form means that the agreement comprising the Contingent Asset is in a standard form as published by the Board.
3. The Appendix provided that (amongst other things) "Real estate situated in England, Wales, Scotland or Northern Ireland and subject to a first priority legal mortgage or fixed charge in favour of the trustees of the Scheme" was permitted as a Type B Contingent Asset. Paragraph 10 of the Appendix contained two further conditions: (1) that the mortgagor or chargor is an Employer's Associate, and (2) without prejudice to any additional requirements stipulated in the appropriate Contingent Asset Certificate or the accompanying notes, the asset is irrevocably available to the trustees of the Scheme upon the insolvency of the Employer(s).
4. The PPF also issued a document "Guidance in relation to contingent assets" in December 2011 (the Guidance). This set out the certification requirements for submitting a Contingent Asset. Amongst other things, trustees were required to provide a Legal Opinion prepared by a suitably qualified person (paragraph 2.1.3). The requirements for a Legal Opinion were set out in Part 8 of the Guidance.
5. The Contingent Asset in question is a Security Agreement relating to 28 properties in England and Wales up to the value of £33,920,000.
6. A Security Agreement was made between Action for Children (the Scheme's sponsoring employer) and Action for Children Pension Trustee Limited (the Scheme's Trustee) on 7 March 2011. This was registered at Companies House on 9 March 2011. Squire Sanders Hammond provided a Legal Opinion dated 28 March 2011. The Contingent Asset was accepted by the Board for the purposes of the 2011/12 risk-based levy.

7. A Supplemental Security Agreement was made between Action for Children and Action for Children Pension Trustee Limited on 17 August 2011. It related to the substitution of one property for another. Squire Sanders wrote to the PPF notifying them that there had been a substitution of property in respect of the Security Agreement. They enclosed a certified copy of the Supplemental Security Agreement dated 17 August 2011, a copy of a property valuation, copies of certificates of title and a copy of a Legal Opinion dated 17 August 2011. They said that the Supplemental Security Agreement had been registered at Companies House on 19 August 2011 and with the Land Registry on 1 September 2011. They also enclosed an Officer's Certificate dated 17 August 2011.
8. The PPF wrote to Squires Sanders, on 29 September 2011, confirming that the Board had investigated the amendment to the Contingent Asset Certificate and decided that no further action was required.
9. A further substitution was made in January 2012 and a second Supplemental Security Agreement was made on 18 January 2012. Squires Sanders wrote to the PPF, on 20 February 2012, notifying them of the substitution and enclosing the same type of documentation as before, including a Legal Opinion dated 18 January 2012.
10. On 26 March 2012, the Scheme submitted a Contingent Asset Certificate for the levy year 2012/13. The two property substitutions were listed as "Amendments to previous year's certificate". The PPF raised a query with Squires Sanders because they had not received a hard copy of the Contingent Asset Certificate. Squires Sanders responded by sending a PDF copy. They explained that the substitutions and re-certification had been dealt with as separate issues. Squires Sanders said that, at the time of re-certification, they had already made the first and second substitution submissions and did not submit documentation with the Contingent Asset submission. They said that they had not submitted a hard copy of the Contingent Asset Certificate because the Security Agreement had been recognised by the PPF for the previous levy year. The notes to the Contingent Asset Certificate state that a hard copy must be sent to the Board if the Contingent Asset has not been recognised for the purposes of the previous levy year.
11. The PPF issued an invoice on 9 November 2012. The Applicant requested a review. The Board issued a review decision on 23 January 2013 and the Applicant requested reconsideration. The reconsideration was requested on the following grounds:
 - The Board had erred in concluding that the Scheme had not satisfied the Contingent Asset re-certification requirements, as prescribed by the Determination. (**Ground A**)

- The review decision had not been properly made because: (a) the Board’s discretion was wider than the decision suggested and (b) regardless of this, it should have been exercised in the Scheme’s favour. (**Ground B**)

PPF’s decision

12. The Board’s Reconsideration Committee issued a decision on 15 May 2013 (the **Reconsideration Decision**).

13. With regard to Ground A, the Reconsideration Committee decided:

- Taken together, Rule G3.1 and paragraphs 38(c) and (d) of the Appendix require trustees to be able to declare that there is no prior or *pari passu* security interest affecting the property in question.
- For trustees to be able to make that declaration, the legal opinion must come after the registration of the security, when the ranking of interests has taken place and is known.
- The Legal Opinions dated 17 August 2011 and 18 January 2012 (the **Legal Opinions**) were given before registration of the securities took place.
- The Legal Opinions were further qualified by the statement,

“We express no opinion in respect of the title of the Chargor to any Security Asset, the priority of any Security Interest created by the Supplemental Security Agreement, as to the nature of the Security Interest created thereby (whether fixed or floating) or as to the marketability of the Security Assets.”
- Any certificate given as part of the recertification process must meet the requirements of Rule G3 and paragraphs 38(c) and (d) of the Appendix. In particular, the certifier must be able to confirm that the real estate is not subject to any prior or *pari passu* charges. The legal opinion must support this.
- The certificate and the Legal Opinions were inconsistent and did not provide the required confirmation. Nor did the Legal Opinions explain how the inconsistent provisions are to interact.
- The legal position has changed since the Legal Opinions were given because the charges have been registered and the order of priorities has become fixed. Recognition of a Type B Contingent Asset requires a legal opinion to confirm what the ranking of charges is. This should have been confirmed to the Board in a further legal opinion.

- Paragraph 8.4 of the Guidance lists a number of caveats to legal opinions which the Board had deemed to be unacceptable. One of these was very similar to the wording used in the Legal Opinions (see above).
- The original legal opinion had been accepted for the levy year 2011/12. However, paragraph 10.1.6 of the Guidance for that year entitled the Board to take a different view in future years. If not, the Board would be required to continue to recognise a Contingent Asset which did not meet its published requirements.
- The Board cannot recognise a Contingent Asset unless it appears to it that the asset meets all the relevant provisions of the Determination and the Appendix. The Contingent Asset submitted by the Scheme did not meet these requirements.

14. With regard to Ground B, the Reconsideration Committee decided:

- The Applicant had referred to discretions available to the Board under Rules B2.1(1), B3.1 and G3.3.
- With regard to Rule B2.1(1), the failure to confirm the priority of charges was not a matter for the Board to correct. The caveat could have been omitted from the Legal Opinions if the Trustees had waited for the registration process to be completed before obtaining them.
- In any event, Rule B2.1(1) was intended to allow the Board to correct data which was incorrect in a material respect for the purposes of the levy calculation. The Board already had sufficient data to calculate the Scheme's 2012/13 levy. The discretion under Rule B2.1(1) did not therefore arise.
- With regard to Rule B3.1, its purpose is to enable the Board to obtain sufficient information to calculate the levy where the lack of information would prevent this. The Board already held sufficient information about the Scheme to calculate the 2012/13 levy.
- With regard to Rule G3.3, the failure of the Scheme Trustees to await the outcome of the registration process was not reasonable for the purposes of Rule G3.3(3).
- In any event, the discretion to "recognise any or all of those Contingent Assets for the purposes of the 2012/13 Levy Year, full or in part" did not apply to a Type B(ii) Contingent Asset. The discretion to recognise a Contingent Asset in part is to enable the Board to treat an otherwise valid Contingent Asset as having a lower value than the amount expressed in the security document.

Grounds for Referral

15. The Applicant has requested a review of the Reconsideration Committee's decision on the following grounds:
- The reconsideration decision failed to take key aspects of the grounds for requesting reconsideration into account. It therefore failed to consider the grounds for requesting reconsideration properly. (**Ground X**)
 - The decision did not properly acknowledge the practical effect of Clause 20(b) of the Security Agreement. The conclusion that the discretion under Rule G3 was not available was not properly founded. (**Ground Y**)
 - The Committee did not explain why the Board's discretion under Rule G3.3(1) could not be applied to the Security Agreement. (**Ground Z**)
16. The Applicant submits that, had the first and second property substitutions not taken place, the Board would have been obliged to accept the Security Agreement for the 2012/13 Levy Year because:
- The requirements of Rule G2.5(2) were satisfied. Rule G2.5 placed the Board under an obligation to accept a Contingent Asset which had been accepted for the last Levy Years if the conditions in G2.5(2) were satisfied. Those conditions and, in particular, the conditions set out in paragraph 39(b) of the Appendix made it clear that there was no need for a new legal opinion where the original opinion had been accepted and there had been no change to the legal position of the Contingent Asset. The conditions for accepting a previously accepted Contingent Asset do not allow for a re-evaluation of whether or not the original legal opinion met the requirements of paragraph 38(d) of the Appendix. This would contradict the express provision (in paragraph 39(b)) that no new or updated legal opinion was needed where the legal position has not changed. In addition, there is no reference to re-evaluation in paragraph 39(b) of the Appendix or Rule G2.5.
17. The Applicant submits that the only change to the Security Agreement was that there were two minor property substitutions representing less than 5% of the Asset Value. The Applicant submits that this made no difference to whether or not the Security Agreement should have been recognised because:
- The only difference the substitutions made to the recertification procedure was that paragraph 39(b) of the Appendix required the provision of the document effecting the substitution, the legal opinion, the valuation and a certificate of title relating to the substituted property.

- In each case, the first and second supplemental legal opinions (the Legal Opinions) mirrored the legal opinion dated 28 March 2011 (the **First Legal Opinion**). Paragraph 39(b) of the Appendix is not intended to allow the Board to take a different and inconsistent view of whether the First Legal Opinion complied with the requirements in paragraph 39(b) or whether the Legal Opinions complied with these requirements. If the Board considered that the First Legal Opinion satisfied the underlying legal requirements and such requirements have not changed, then if materially identical opinions are submitted, the Board cannot take a different view.
 - The Legal Opinions were not submitted as part of the recertification procedure. Recertification was given pursuant to the First Legal Opinion. The PPF had advised that mid-year substitutions would be considered under the criteria dealing with amendment and replacement of securities rather than being dealt with as part of recertification. The substitutions had been submitted before the recertification and the expectation engendered by the Board was that they would be dealt with separately. Any issues arising from the substitutions were expected to be dealt with separately in advance of adjudication of the recertification.
18. The Applicant refers to the Reconsideration Committee's finding that obtaining a legal opinion prior to completion of the registration process was unreasonable. The Applicant states that the opinion was issued prior to the completion of registration because:
- Under Clause 20(b) of the Security Agreement, the delivery of a legal opinion in respect of the Second Supplemental Agreement was a condition of its completion. Registration of the Second Supplemental Agreement could not precede its completion.
 - The legal opinion dated 17 August 2011 was issued prior to completion of registration and was accepted by the Board.
19. The Applicant submits that, in the circumstances, issuing the legal opinion dated 18 January 2012 prior to completion of registration was entirely reasonable. The Applicant submits that it was not open to the Reconsideration Committee to conclude that the discretion under Rule G3 was not available to the Board.
20. The Applicant disagrees with the Reconsideration Committee's interpretation of Rule G3.3(1). That is, that the discretion to recognise a Contingent Asset in full or in part does not apply to a Type B(ii) Asset. The Applicant submits that this cannot be reconciled with an ordinary reading of the Determination. The Applicant submits that Rule G3 referred to and was intended to apply to Contingent Assets, as defined by Rule G2.2.

21. The Applicant submits that Rule G3.3 allows recognition of a Contingent Asset where the conditions in Rule G3.3(2) apply and the Asset has failed to meet one of the requirements in Rules G3.1 or G3.2. The Applicant submits that the requirements in Rule G3.1 include certifying that the requirements for recognition are satisfied (Rule G3.1(2)(i)). The Applicant submits that, if the Board considers that the requirements for recognition are not met because the Legal Opinions did not provide the required assurances, it has discretion under Rule G3.3 to recognise the Security Agreement in full or in part. The Applicant submits that the conditions in Rule G3.3(2) are satisfied in that the Trustees have not taken action that has had a materially detrimental effect on the Scheme.

Representations from the PPF

22. Upon notification of the referral, the PPF reviewed the case and concluded that the Reconsideration Committee had not reached its decision correctly. The PPF submitted that the Committee should not have attributed the rejection of the Contingent Asset solely to the availability and application of Rule G3.1. The PPF submitted that the Committee should have identified and considered Rule G2.5 as the primary basis on which the Determination requirements had not been met. The PPF also accepted that the Reconsideration Committee's interpretation of the discretion in Rule G3 was incorrect; they accepted that the discretion would apply to all types of Contingent Asset, if the criteria specified were met.

23. On this basis, the PPF suggested that the referral be withdrawn and the matter remitted to the Reconsideration Committee. The Applicant declined to withdraw the referral for the following reasons:

- The PPF's proposal did not address the primary ground for referral (Ground X). If the matter was remitted to the Reconsideration Committee, it would continue to fail to properly consider the key aspects of Ground A.
- The proposal appeared to substantiate Ground Z in that the PPF now accepted that it was wrong to conclude that Rule G3.3 did not apply to Type B(ii) Contingent Assets. However, the PPF had attempted to put forward new reasoning to justify the conclusion previously reached.
- The Applicant disagreed with the reasoning put forward to justify the conclusions that Rule G3.3 did not apply. If the Security Agreement was not recognised because it failed the test in Rule G3.1 by virtue of not having been properly certified, the discretion in G3.3 arose. The fact that the test in Rule G2.5 was also failed is beside the point.

24. The PPF therefore make the following submissions:

- When it recertified the Security Agreement, the Scheme was required (i) to confirm, on the basis of a legal opinion, that it had been duly registered and created a first priority charge in the Scheme's favour (paragraphs 38(c) and (d) of the Appendix), and (ii) to supply a legal opinion relating to the substituted property which complied with the Guidance (paragraph 39(b)).
- Paragraph 8.4.1 sets out certain types of qualifications to legal opinions which they consider unacceptable. The legal opinion dated 18 January 2012 contained a qualification which was identical to the example in the Guidance. It therefore failed to comply with the requirements.

25. The PPF submit that the Scheme's Contingent Asset failed to comply with the following requirements set out in the Determination and each of these was sufficient, in itself, to justify non-recognition:

- It failed to comply with paragraph 39(b) of the Appendix which meant that it failed to meet the condition in Rule G2.1(2) that hard copy documents be submitted by 30 March 2012.
- It failed to meet the requirement in Rule G2.5(ii) to satisfy the requirements of Rule G2 because it failed to comply with Rule G2.1(2).
- It failed to meet the requirement in Rule G2.5(iv) to comply with the requirements of the Appendix.
- It failed to meet the requirement in Rule G2.7 that it appear to the Board that the requirements of Rule G2 and the Appendix have been met.

26. The PPF accept that the Reconsideration Committee gave an incorrect reason for concluding that the discretion under Rule G3.3 did not apply. However, the PPF submit that the conclusion, that Rule G3.3 did not apply, was correct.

27. In response to the specific grounds for referral put forward by the Applicant, the PPF submit:

- They agree that the recertification rules do not generally require a new legal opinion to be supplied. However, each recertification must contain a fresh confirmation "given on the basis of a legal opinion" that the relevant agreement creates a first priority charge (paragraphs 38(c) and (d) of the Appendix). The legal opinion must comply with the requirements set out in the Guidance (paragraph 4(12) of the Appendix).

- Where the legal opinion upon which the required declaration is based either does not comply with the requirements set out in the Guidance or does not contain an opinion as to priority, the Rules require them to find that the declaration has not been given properly.
- It is irrelevant whether the deficiencies in the earlier legal opinions were identified. Paragraph 3.5.3 of the Guidance makes it clear that recognition of a Contingent Asset “does not imply that the Board has reviewed the documents in detail and does not rule out a future review”.
- There is nothing in the Determination which prohibits the Board from reaching a different conclusion from one levy year to the next.
- They do not accept that it would be perverse to identify deficiencies in legal opinions which they had once mistakenly failed to notice. They consider that it would be more perverse for the Board to have identified a deficiency in the Scheme’s Contingent Asset submission and ignore it on the basis that it had previously not been considered.
- Paragraph 39(b) of the Appendix requires schemes to provide a legal opinion when there has been a substitution of property in respect of a Type B(ii) Contingent Asset. The legal opinion submitted by the Scheme for the 2011/12 Contingent Asset did not cover the properties which were subsequently substituted. Recertification on this basis did not comply with the requirements of paragraph 39(b). In addition, the legal opinion did not comply with paragraph 38(c) of the Appendix.
- None of the legal opinions supplied confirmed that the Security Agreement created a first priority charge in favour of the Scheme’s Trustees.
- It is not relevant to consider whether the Scheme’s Trustees had acted reasonably because the Board has no discretion under Rule G3.3 to recognise the Contingent Asset.

Supplementary Statement by the Applicant

28. The Applicant has made the following further submissions:

- The PPF take the view that the second substitution means that the Security Agreement cannot be recognised at all, including that part which has not been substituted. This view appears to be based on the fifth bullet point in paragraph 39(b) of the Appendix. It is misconceived for the reasons already given.

- The PPF suggest that the Legal Opinion dated 18 January 2012 was reviewed by the Board as part of the recertification process. It may be the case that the Board reviewed it around the time of recertification, but it cannot be the case that it was reviewed as part of recertification. It was submitted prior to recertification pursuant to the second substitution following the approach endorsed by the PPF in respect of the first substitution.
- The only legal opinion submitted as part of recertification was that dated 28 March 2011 and this was perfectly proper. The second supplemental legal opinion dated 18 January 2012 was not submitted for the purposes of paragraphs 38 and 39 of the Appendix.
- The qualification in the Legal Opinions which the Board has identified as being deficient was not referred to in or deemed to be unacceptable by any guidance published prior to the Guidance. The legal opinions dated 28 March and 17 August 2011 were issued prior to the publication of the Guidance.
- The PPF appear to accept that, putting Rule G2.5 to one side, Rule G3.3 would apply because the only thing preventing the Security Agreement being recognised would be Rule G3.1. That is, failure to comply with the Appendix meant that Rule G3.1(2) was not complied with. The PPF suggest that the same failure to comply with the Appendix means that Rule G2.5 was not satisfied and Rule G3.3 does not apply because there is something other than Rule G3.1 which prevented the Security Agreement from being recognised. This is an artificial suggestion because the failure to satisfy Rule G3.1 to substantively the same as the failure to satisfy Rule G2.5, rather than being an additional failure.
- The discretion in Rule G3.3 does apply because, but for the failure to satisfy the Appendix, the Board would have had to have recognised the Security Agreement.
- The failure to comply with Rule G3.1(2)(i) will always constitute a failure to comply with Rule G2.5. Therefore it cannot be intended that the same failure is meant to stop Rule G3.3 applying.

Conclusions

29. The certification and recognition requirements for a Type B Contingent Asset were set out in Part G of the Determination.
30. The Scheme submitted a Contingent Asset Certificate for the Levy Year 2012/13 on the basis that the Contingent Asset in question (the Security Agreement) had been recognised by the Board for 2011/12. In which case, Rule G2.5 would apply.

31. Under Rule G2.5(2), the Board was required to recognise a Contingent Asset where (amongst other things) “the relevant requirements of Rules G2 and G3 [were] satisfied” and “the requirements of the [Appendix] which [were] relevant to Contingent Assets which have been recognised in a previous Levy Year [were] satisfied”. The Scheme’s Contingent Asset would therefore first have to satisfy the requirements of Rule G2. In summary, these were:
- that a Contingent Asset Certificate and such hard copy documents as required by the Appendix had been submitted before 30 March 2012;
 - that the Contingent Asset was a security in Acceptable Form which complied with paragraphs 8 to 11 of the Appendix;
 - that the arrangement became effective no later than 1 April 2012; and
 - that it reduced the risk of compensation being payable from the PPF.
32. Paragraphs 36 to 39 of the Appendix applied to a Type B(ii) Contingent Asset.
33. Where a Contingent Asset had been recognised for the 2011/12 Levy Year, Paragraph 37(b) required the Contingent Asset Certificate to state whether any amendments had been made since it had previously been submitted and, if so, what they were. Paragraph 38(c) required confirmation that (amongst other things) the security had been properly registered with the Land Registry at the point the Certificate was given to the Board. It also required confirmation that it created a charge in favour of the Scheme over the property and that the property was not subject to any prior or *pari passu* security interest. Paragraph 38(d) required the above confirmations/declarations to be given on the basis of a legal opinion.
34. So far as documentation was concerned, where a Contingent Asset was being recertified, paragraph 39(b) required (amongst other things) that, if a new legal opinion had been obtained, a copy of that opinion be supplied to the Board. It went on to state that there was no general requirement to obtain an updated legal opinion but that the trustees might wish to do so before making the declarations required in paragraphs 38(c) and (d). It stated that the trustees should obtain an updated legal opinion if they had reason to believe that the legal position might have changed since the original opinion.
35. These were the “requirements of the [Appendix]” which had to be satisfied in order to comply with Rule G2.5(2).
36. In view of the amendments to the Security Agreement, the Scheme Trustees had reason to believe that the legal position had changed (however marginally) and, therefore, an updated legal opinion was required. It follows that any such legal opinion had to support the declarations made in the Contingent Asset Certificate as to the

status of the charge created in favour of the Scheme by the Security Agreement; namely, that the properties concerned were not subject to any prior or *pari passu* interest. None of the Legal Opinions (dated 28 March and 17 August 2011 and 18 January 2012) could support these declarations because they pre-dated registration of the second Supplemental Security Agreement. I understand that, in the case of the Legal Opinion dated 18 January 2012, this was done in order to comply with Clause 20(b) of the Security Agreement. However, this does not alter the fact that none of the Legal Opinions were sufficient for the purposes of paragraphs 38 and 39 of the Appendix. The trustees, therefore, failed to obtain an updated legal opinion which could support the declarations they were required to make in the Contingent Asset Certificate.

37. The Applicant argues that the Legal Opinions dated 17 August 2011 and 18 January 2012 were not submitted for the purposes of paragraphs 38 and 39 of the Appendix. This does not help their case since that leaves the trustees dependent upon the Legal Opinion dated 28 March 2011 which clearly pre-dated the registration of the second Supplemental Security Agreement by some margin.
38. I find therefore that the Scheme did not comply with Rule G2.5(2)(iv) in that it did not satisfy the requirement for declarations made in the Contingent Asset Certificate to be supported by a legal opinion.
39. Rule G2.5 provided that the Board was required to recognise a Contingent Asset where the relevant requirements of both Rules G2 **and** G3 were satisfied. If the Scheme failed to satisfy the requirements of Rule G2, the Board was not required to recognise the Contingent Asset regardless of whether or not it complied with Rule G3.
40. The Applicant has argued that, putting Rule G2.5 to one side, non-compliance with paragraphs 38 and 39 of the Appendix constitutes non-compliance with Rule G3.1(2)(i). On this basis, the Applicant considers that Rule G3.3 should apply. The argument being that a failure to comply with Rule G3.1(2)(i) will always constitute a failure to comply with Rule G2.5 and it cannot have been intended that the same failure should prohibit Rule G3.3 from applying.
41. This is an artificial argument because it is not possible to put Rule G2.5 to one side. The question of whether or not Contingent Assets from previous years are to be accepted is clearly intended to be considered under Rule G2.5. If the Scheme fails to comply with Rule G2.5, that is the end of the matter.
42. The Applicant seeks to argue that the application of Rule G3.3 should be treated as an alternative to the application of Rule G2.5. In other words, if the Board did not accept that the requirements of Rule G2.5 were met, it could go on to consider exercising the discretion contained in Rule G3.3 because there had been a failure to comply with Rule G3.1(2)(i).

43. I agree that, in the particular circumstances of the Scheme, there was also a failure to comply with Rule G3.1(2)(i). If this had been the **only** thing preventing the Board from recognising the Contingent Asset, then Rule G3.3 would apply.
44. It would be possible for a scheme to satisfy the requirements of Rule G2.5 but fail to satisfy Rule G3.1(2)(ii). This situation arises where a Contingent Asset satisfies the requirements of Rule G2 and the Appendix but there has been an amendment to it since it was last certified. An amendment, in and of itself, does not mean that the Contingent Asset could not satisfy the requirements of Rule G2 and the Appendix. Under those circumstances, the Board may then consider whether or not to exercise the discretion provided in Rule G3.3. Since the Scheme failed to satisfy Rule G2.5 in the first instance, the Board could not apply Rule G3.3.
45. I note the Applicant's comments as to the difference in approach taken between the two Levy Years. However, it is clear that recognition of a Contingent Asset under Rule G2.5 requires compliance with the 2012/13 Determination and Appendix. Had there been no amendment to the Security Agreement, it is arguable that the First Legal Opinion would have satisfied the requirements set out in the Appendix because it was given after registration of the Agreement. The PPF have pointed out that it contained a qualification which they find unacceptable and have referred to Part 8 of the Guidance. However, the Guidance does not form part of the Determination or the Appendix and does not have their statutory force. It is, of course, irrelevant in this case because the Scheme failed to comply with the Determination.
46. Unusually, both the Applicant and the PPF are of the opinion that the Reconsideration Committee failed to reach its decision correctly. They differ, of course, in their views as to why that was and what subsequent action should be taken.
47. The regulations governing my office state that, if I consider that the Reconsideration Committee's decision was not reached correctly, I must determine what action, if any, the Board should take. In those circumstances, I must remit the matter to the Board with directions for it to vary or revoke the decision.
48. I find that the Reconsideration Committee did not reach its decision correctly because it referred to Rule G3.1 rather than G2.5 in deciding that the Scheme had failed to comply with the requirements for recognition of the Contingent Asset.

Directions

49. I remit the matter to the Board and direct that the Reconsideration Committee's decision be varied so that it sets out the correct reasoning for not recognising the Scheme's Contingent Asset.

Tony King
Pension Protection Fund Ombudsman

7 May 2015