PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE PENSIONS OMBUDSMAN

Applicant	Mr Anthony Harris
Scheme	Aviva policy ET043045 (**the Policy**)
Respondent	Aviva plc (**Aviva**)

Subject

Mr Harris has complained that Aviva have not permitted him to receive the value of the Policy at age 60.

The Pensions Ombudsman's determination and short reasons

The complaint should be upheld against Aviva. The Policy, whilst it does not properly deal with the circumstances that have arisen, should be construed in such a way as to allow the payment of a pension from age 60.

DETAILED DETERMINATION

Material Facts

1. In 1991 Mr Harris transferred the value of his deferred benefits in the TSB Group Pension Scheme (**the TSB Scheme**) to a "Section 32 Buy out policy" (**the Policy**) issued by Norwich Union, now Aviva.

2. The proposal for the Policy was made jointly by the trustees of the TSB Scheme and Mr Harris. The proposal form (**the Proposal**) was signed on 25 October 1991 and contained the following declaration:

   > "This Proposal shall be the basis of the contract between ourselves and The Norwich Union Life Insurance Society…"

3. Mr Harris had, during his membership of the TSB Scheme, been contracted-out of the state earnings-related pension scheme and so the TSB Scheme had accrued liability to pay a guaranteed minimum pension (**GMP**) under sub-paragraph (1)(b) of Section 33 of the Social Security Pensions Act 1975 (**SSPA75**), later re-enacted in the Pension Schemes Act 1993. The GMP was included in the benefits to be transferred.

4. Section 33(1) said that a contracted-out scheme had to provide a person who reached state pensionable age with a pension and had to include a rule that the pension should not be less than the guaranteed minimum under section 35. Section 35 sets out how the guaranteed minimum is calculated, but does not say any more about when it is payable.

5. Section 26(2) contained a definition of "guaranteed minimum pension", being (in summary) any pension provided by an occupational pension scheme, to the extent that its weekly rate equalled the guaranteed minimum determined for the purpose of section 33. It follows, therefore, from the reference to state pensionable age in section 33 that the guaranteed minimum pension for the purposes of SSPA75 is, in relation to a contracted-out person, a pension payable at state pensionable age. (Different provisions relate to pensions payable to spouses, but they are not relevant to this case.)

6. Section 52C of SSPA75 allowed for an occupational pension scheme to be discharged of its liability for GMP where that liability was secured in a specified way. The Policy was intended to achieve such a discharge and its effectiveness in doing so is not at issue.

7. Section 3 of the Proposal gave details of Mr Harris' employment, including that his retirement age was 60. Section 6 of the Proposal dealt with contracted-out employment. It was completed to show that Mr Harris was entitled to GMP accrued before 6 April 1988 of £1,125.28 a year, and from 6 April 1988 of £211.12 a year. (The copy in my possession is not easy to read, but I deduce this to be the figure from the forms referred to below). The "Revalued GMP to State Pension Age" was £8,149.44.

8. Enclosed with the Proposal were two Department of Social Security forms, one of which was form RD570. The RD570 "Notice of guaranteed minimum pension liability" said:

> "According to our records the weekly amount of GMP for the above period [6 April 1978 to 20 September 1990] is £25.70 which, subject to revaluation at the appropriate rate … will be payable from 10/03/17"

9. Norwich Union's illustration with a "currency date" of 29 November 1991 showed a retirement age of 60 and a transfer value of £38,455.87.

10. The section headed "<u>BENEFITS AT RETIREMENT" began:</u>

> "In order to provide an indication of the possible benefits that might be paid under this policy, Lautro (the regulatory authority for the marketing of life assurance and unit trusts) has made rules which lay down two bases on which future benefits may be illustrated."

11. It went on to identify that the transfer value would provide a "Guaranteed Retirement Fund" of £120,483. Then there were two potential columns showing an "illustrative retirement fund" and the single life and widow's pensions resulting from that fund at either an 8.5% or 13% annual future growth rate. The 8.5% column showed no figures. It said (in capitals) "Guaranteed Minimum Pension as shown below applies". At 13% the retirement fund was £405,000 and the single life and widow's pensions were £21,300 and £10,600 respectively. A later note explained that the annuities would increase in payment at 7.5% a year.

12. Under the heading "Guaranteed Minimum Pension" the illustration says:

> "At State Pension Age the policy will provide at least:

Single Life Guaranteed Minimum Pension of which £1278.52 will increase at a rate of 3% p. a. compound.	£8149.96
Widow's Guaranteed Minimum Pension of	£4074.98

> which £643.76 will increase at a rate of 3%
> p. a. compound.
>
> In order to meet the guaranteed minimum requirements it may be necessary to alter the mix of benefits."

13. (We asked Aviva what was the import of there being no pension figures shown under the 8.5% assumed growth rate. They explained that at that growth rate there would not have been sufficient funds to secure an annuity increasing at 7.5% which would have equalled the GMP by age 65. They say that there *would* have been sufficient to secure an annuity with a lower increase rate that would have met the GMP at age 65.)

14. The section of the illustration that is headed "BENEFITS PAYABLE ON DEATH BEFORE RETIREMENT" begins:

> "On death before age 60 the accumulated value of the policy will be paid (subject to a minimum of £38455.87).
>
> The cost of the widow's Guaranteed Minimum Pension, on death before age 60, will be deducted from the death benefit…"

15. There is a notes section with seven notes, none of which refers to GMPs. Note 6 (the only note in bold and capitals) says that the benefits are subject to any restrictions required by the Inland Revenue.

16. A footnote says that the illustration must be read together with transfer technical plan specification M(L) 71; Aviva have provided a copy of technical specification that they say would have been provided.

17. Under the heading "**Retirement Age"** the technical specification says:

> "The pension age under this Plan must be the same as that specified by the scheme providing the transfer value.
>
> The Plan can cater for early or late retirement, however, retirement cannot be deferred beyond age 70."

18. Under the heading "**Special Conditions Relating to Transfers from Contracted Out Schemes**" it says**:**

> "If the transferring scheme is contracted out of the State Earnings Related Pension Scheme (SERPS) the Plan can only be written if Norwich Union considers the transfer value to be sufficient to provide at least the Guaranteed Minimum Pension (GMP) …"

And at the end of that section:

> "Providing your Total Fund will guarantee pension benefits which are greater or equal to the GMP, all benefits may be taken before State Pension Age."

19. The technical specification explains the allocation of annual, special and additional bonuses to produce the "Total Fund at retirement". Then, under the heading "**Benefits on Retirement**", it says:

> "At retirement you can use the full value of your Total Fund to provide the following benefits:-
>
> Pension
>
> A pension payable for your lifetime …
>
> Tax-Free Cash
>
> At retirement it may be possible to take all, or part of your pension in the form of a tax-free cash sum. The amount available may have to be restricted to ensure that the pension payable is not less than the required Guaranteed Minimum Pension."

20. The Policy commenced on 17 December 1991, at which point Norwich Union wrote to Mr Harris. The letter said:

> "BENEFITS
>
> At normal pension age 60 a Guaranteed Retirement Fund of £120,483.00 with compound bonus will be used to provide retirement benefits within Inland Revenue limits.
>
> …
>
> GUARANTEE
>
> From State Pension Age the policy will provide at least the revalued Guaranteed Minimum Pension of £8149.96 per annum …"

21. The First Schedule to the Policy identifies, amongst other things, that the "Benefit date" is 10 March 2012, Mr Harris' 60th birthday.

22. The Second Schedule says, under the heading "BENEFIT AND EVENT":

> "CAPITAL SUM
>
> On survival of the Insured until the Benefit Date a Capital Sum of £120483.00 (plus compound bonus declared thereon by the Society from time to time) which shall be applied in accordance with Policy Condition 7."

The Second Schedule provides that on death before the Benefit Date a widow's pension is payable with the balance of the Capital Sum payable as a lump sum.

Then, under the heading "DEFINITIONS" it says:

> "GUARANTEED MINIMUM PENSION
>
> £1336.40 per annum increased by 7.5% compound for each complete year from 6th April 1991 to the 6th April immediately preceding the attainment by the Insured of the State Pensionable Age of 65 or the Insured's death whichever is the earlier and increasing annually from the State Pensionable Age in respect of that part earned from 6th April 1988 at a compound percentage rate of 3%."

23. Policy Condition 7 says:

> "7. Application of the Capital Sum
>
> At the Benefit Date or the Substitute Benefit Date so much of the Capital Sum as shall be appropriate shall be applied using the Society's then current annuity rates to purchase an immediate pension payable to the Insured equal to the Guaranteed Minimum Pension and a Widow's Pension payable on the death of the Insured to his Widow (if any) equal to the Guaranteed Minimum Widow's Pension. The balance of the Capital Sum shall be applied at the same date using the Society's then current rates to secure such Relevant Benefits as the Insured shall decide …"

Then, at the end of a paragraph that deals with supplementary matters such as frequency of payments and the duration of the pension (that is, for life), Condition 7 concludes with:

> "The total amount of the Insured's pension and Widow's pension payable shall not be less than the total amount of Guaranteed Minimum Pension and Guaranteed Minimum Widow's Pension respectively required by the Social Security Act 1975"

24. Policy Condition 9 says:

> "If the Insured remains in remunerated employment after the Benefit Date he may elect to defer the Benefit Date until the date of his actual retirement or the attainment of age 70 whichever is the earlier. In this event the increase in the Capital Sum will be of such amount as the Society shall determine and the Widow's Pension on Death before the Benefit Date shall not be payable if the Insured dies after the Benefit Date stated in the First Schedule."

25. Norwich Union wrote to Mr Harris on 25 April 2001, in response to an enquiry. The letter said that there were insufficient funds in the policy to cover the GMP, which they were legally obliged to pay from state pension age, and that it was therefore not possible to provide a quotation from age 50.

26. On 5 October 2010 Mr Harris complained to Aviva about the performance of his fund - he was disappointed that the regular bonuses were lower than anticipated. Aviva replied to Mr Harris on 25 October 2010; the letter also made reference to the GMP.

> "Your policy also provides a Guaranteed Minimum Pension (GMP) benefit of £8,149.96 which becomes payable from age 65. When the transfer from TSB company pension took place, the original transfer value included a liability for us to pay the GMP amount from state pension age…If though you want us to pay retirement benefits before age 65, we have to ensure the total guaranteed value for your policy is sufficient to secure the GMP which needs to be paid. Where the GMP cannot be secured we will be unable to provide options for you."

27. On 16 May 2011 Aviva wrote to Mr Harris because they had been asked to carry out a review of the concerns Mr Harris raised on 5 October 2010. The following information was given in the letter

> "Benefit date – The benefit date is 10 March 2012 as long as there are sufficient funds to cover GMP. If the fund does not cover the cost of paying benefits as at 10 March 2012 we will be able to pay the benefits once the cost is covered. Once you reach 65, being your SPA [state pension age], we would pay GMP even if the fund value did not cover this. This would become your benefit date."

28. On 18 May 2011 Aviva issued an annual certificate. On the accompanying statement retirement age was specified as at age 60.

29. On 20 September 2011 Aviva wrote to Mr Harris saying:

> "Minimum value at retirement:
>
> £156,753.75
>
> This is the minimum amount you will receive at age 60 based on all contributions being paid when they are due. If contributions stop before age 60 we will work out a new minimum amount…
>
> Our records show you are due to start taking the retirement benefits from your Section 32 Policy on 10 March 2012."

30. On 24 January 2012 Aviva wrote to Mr Harris, as follows:

> "I refer to your request for an immediate retirement quotation.
>
> It is possible for a member to retire before State Pension Age under the rules of this plan providing there are sufficient funds to cover the Guaranteed Minimum Pension (GMP) liability.

> GMP is an element of pension benefit in respect of the period you were contracted out of the State Pension. It is required that at least this level of pension be provided at state pension age under this plan.
>
> My calculations show that it is not possible for us to pay the full GMP…"

31. Mr Harris wrote a letter of complaint to Aviva on 4 February 2012, which eventually led to a complaint being brought to my office.

Summary of Mr Harris' position

32. Mr Harris strongly disagrees with Aviva's decision not to pay benefits until his 65th birthday. He makes the following arguments.

33. Policy condition 7 clearly sets out that at the benefit date (10 March 2012) the capital sum shall be used to purchase an immediate pension.

34. Nowhere in the policy documentation are there circumstances given where benefits are paid out later than age 60.

35. Until 2010, all of the paperwork he ever received since inception of the policy said that pension benefits are due at age 60.

36. He has never opted to defer his retirement.

37. By failing to pay benefits at his 60th birthday Aviva are in breach of the original contractual terms.

38. On 11 February 1991, the financial adviser who assisted him wrote a letter stating:

> "One of the significant advantages the Transfer Plan has over leaving your benefits preserved with TSB is that, you will be able to take all of your pension at age 60 and not wait until state pension age to take the GMP element"

39. He considers that Aviva are rewriting or amending the policy in hindsight, which they cannot do. How the policy was written in 1991 is the relevant issue.

40. If his policy is insufficient to support GMP Aviva should apply a final bonus to meet the guarantees they made.

Summary of Aviva's position

41. The policy is to be interpreted in the light of the circumstances in which it was made (the "factual matrix") and the question to be decided is what the words would mean to reasonable persons standing in the place of the parties, who understood the background.

42. If it is possible to construe the policy against the factual matrix in that way, then the rule that states that an unclear contract should be construed against the drafter (the "contra proferentum" rule) should not be applied.

43. The background can be taken from:

    - the legislative background;
    - the "pre-contractual documentation" (the illustration, the proposal and the technical specification);
    - the "with-profits context".

44. On the legislative background, Aviva say that the relevant legislation provides for entitlement to the GMP at state pension age and that contracted-out schemes, such as the one that the transfer came from, were required to ensure that if a pension was taken early it would be at least the GMP at state pension age. They say there is no provision for a "quasi-GMP" at an earlier age.

45. In relation to the "pre-contractual documentation", Aviva draw my attention to the sections that I have quoted earlier which do not refer to the GMP being payable at any earlier age than State pension age, and which say that at that age the policy will provide "at least" the GMP. They particularly refer to the statement in the technical specification: "Provided your total fund will guarantee pension benefits which are greater or equal to the GMP all benefits may be taken before State Pension Age."

46. Finally, the "with-profits context" is that the cost of providing benefits to any policy-holder that exceed the available capital sum would be to reduce the value of the with-profits fund to the detriment of all other with-profits policy holders.

47. On the policy terms themselves Aviva say the following.

    - The Second Schedule confirms that the capital sum plus bonus is applied in accordance with Policy Condition 7.
    - Policy Condition 7 explains how the fund value must be used as the selected retirement date. It does not state that an immediate annuity will be provided at the selected benefit date.
    - Policy Condition 7 says that the lump sum shall be used to purchase an immediate pension using current annuity rates. This is an important distinction since the actual annuity available will be limited by the amount of the purchase price (lump sum) and the cost of the annuity (the current annuity rate).

- The requirement that any annuity purchased is equal to the GMP is a restriction to ensure that GMP is provided. But the GMP itself is not due until the state pension age.
- The benefits available are limited by the purchase price (the capital sum plus bonus)
- Where the lump sum is not sufficient to purchase an annuity equivalent to GMP at the benefit date (as in Mr Harris' case) then it is not possible to purchase an annuity at that time.
- The introduction of the policy document confirms that the basis of the contract is the Proposal and Declarations made by the Trustees and the Insured.

48. The Proposal was accompanied by, and referred to, form RD570. The fact that the GMP is payable from state pension age was stated on form RD570 as well as the pre-sales illustration of 29 November 1991. It was the clear intention of the parties that the GMP is the contracted out benefit payable from state pension age, as set down by legislation. This is supported by Policy Condition 7, which names the Social Security Act 1975; any references to a GMP in the document should be read in this context.

49. In addition Mr Harris was provided with the following:

    - the letter of 17 December 1991, which said that from state pension age, the policy will provide at least the revalued GMP of £8,149.96; and
    - the letter of 25 April 2001, which explained that they were legally obliged to provide the GMP at state pension age.

50. Policy Condition 7 must be interpreted in the context of the GMP being payable from age 65. Although that might suggest that an "immediate deferred annuity" (Aviva's description) be purchased at 60, in practice Aviva has treated Mr Harris and others more favourably by permitting them to defer purchase of their pension to state pension age. That gives the potential for further growth and flexibility to secure a better annuity rate which may lead to additional benefits to supplement the GMP.

51. Section 32 policies were sold on an advised basis and the policyholder's financial adviser had a fundamental role in ensuring that their client understood the characteristics of the policy.

52. Aviva appreciates that Mr Harris may have relied upon comments made by his financial adviser, but this advice did not originate from them.

53. Aviva have said that there have been other cases in which the Financial Ombudsman Service has determined that the wording of Policy Condition 7 does not provide any guarantee that benefits may be taken before state pension age where there are insufficient funds. They have provided a copy of one such decision which takes the words “so much as is appropriate” in Policy Condition 7 as giving Aviva sufficient leeway to use none of the policy proceeds to secure an annuity before state pensionable age.

Conclusions

Principles of Interpretation

54. It may be helpful to set out Lord Hoffmann’s summary of the relevant principles in *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28. He said:

> “The principles may be summarised as follows:
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using

those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 2 WLR 945

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. 19851 A.C. 191, 201:

> ". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."'

55. I think it is reasonably plain that when the Policy and the other associated documents were issued, the situation that has arisen was not contemplated. A policy in the same terms would function where the retirement age is the same as state pension age. I suspect that was the circumstance for which the Policy was originally designed. It may also be that, at a time when there were high past returns and providers were permitted to base estimates on assumptions of high future returns, the thoughts of the drafters simply did not turn to what might happen before state pension age if returns were low.

56. I have little doubt that had Aviva (Norwich Union, at the time) turned their minds to the matter, they would have written the Policy to ensure that it said clearly what they now argue that it does mean. Similarly, Mr Harris might want to argue that he intended to enter into a contract that would pay a pension from age 60 (and certainly not one that might pay nothing until age 65). But, their subjective intentions are not relevant. Also it is no part of my role to amend the policy to reflect what I think it should have said.

57. What is relevant is how reasonable parties would have understood matters against the background in which the Policy was entered into.

The issue

58. Aviva say that the Policy's proceeds (the "Capital Sum" under the Policy) have to be used first to provide the GMP, which is not payable until 65, and that any balance would be used to provide a pension from age 60 (the "Benefit Date"). In Mr Harris' case the cost of providing the GMP at age 65 exceeds the Policy proceeds, so there is no balance to be applied to provide a pension at age 60.

59. The central question in this case is whether Aviva are correctly applying Condition 7 of the Policy when it says "…At [Mr Harris' 60th birthday] so much of the Capital Sum as shall be appropriate shall be applied using the Society's then current annuity rates to purchase an immediate pension payable to the Insured equal to the Guaranteed Minimum Pension… The balance of the Capital Sum shall be applied at the same date using the Society's then current rates to secure such Relevant Benefits as the Insured shall decide …"

60. The first difficulty is that if "Guaranteed Minimum Pension" in that context is to be understood as a figure payable from state pension age "an immediate pension payable to the Insured equal to the Guaranteed Minimum Pension" has no meaning in a policy written to age 60. There could be no such immediate pension, though an immediate pension is what is to be paid.

61. The second difficulty is that the Policy makes no express provision for any circumstance in which the proceeds are insufficient to provide the GMP (whenever payable). Policy Condition 7 is written on the assumption that there will be more than enough; it says that "so much of" the proceeds will be used to provide the GMP and the balance will be applied to by an annuity on current rates. It does not expressly contemplate the circumstance that has arisen.

The legislative background

62. The Policy defines "Guaranteed Minimum Pension" as set out in paragraph 22. It is a stand-alone definition (that is, it does not refer to legislation, nor does it cross-refer to Mr Harris' TSB Scheme or state scheme entitlements). It is a defined annual monetary sum, increasing each year at a fixed rate of 7.5% to age 65, and 3% on part of it thereafter. The definition says nothing about it being payable at any age, or in relation to any event under the Policy.

63. But Aviva say that the "Guaranteed Minimum Pension" in Policy Condition 7 must only be payable from age 65. They say that the policy guarantee is set out in

Condition 7 as "The total amount of the Insured's pension …payable shall not be less than the total amount of Guaranteed Minimum Pension…required by the Social Security Act 1975". So there is, they would argue, a link to the legislation.

64. They also point out that the Proposal referred to the DSS form RD570 which in turn said that the GMP was payable from 10 March 2017. The illustration and the confirming letter (see paragraphs 10 and 16) also referred to the GMP being guaranteed from state pension age.

65. I agree that it is possible to make a connection back to the requirement under Section 33 of the Social Security Pensions Act 1975 that the scheme by reference to which the insured was originally contracted-out should have a rule that required a total pension of at least the GMP to be payable from state pension age. So if that benefit was not paid Aviva would be in breach of Policy Condition 7. But that does not help greatly with what should happen under the Policy on Mr Harris reaching age 60 unless a reasonable person, aware of the background reasonably available to Aviva and Mr Harris at the time, would conclude that the guarantee was to nothing more than a pension payable from age 65.

66. I do not think it would be right to take Mr Harris as having an awareness of the legislative detail. It is only with careful reading of SSPA75 that one comes to a conclusion that a guaranteed minimum pension, as defined there, only has meaning as in the context of pension payable from state pension age. So the specific information that the statute did not provide for a guaranteed minimum pension other than at age 65 was not reasonably available to Mr Harris.

67. That is not to say that there could not have been a general understanding about the nature of the guarantee, which might in turn have been partly derived from a layman's knowledge of contracting-out.

68. If the nominal reasonable person is attributed a general understanding of the fact that state benefits (and the substitute GMP benefit) are payable from state pension age - and they had read the references to state pension age in the context of GMP in the Proposal, the illustration and the confirming letter - would they have concluded from the terms of the Policy that nothing could be payable under it from age 60 and that all that was guaranteed was the GMP at 65? That calls for consideration of the rest of the background, which I now move on to.

69. One has to be careful to look at the background as a whole. As Lord Hoffmann said "it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man". In particular Aviva refer me to "pre-contractual" material and the "with-profits context".

"Pre-contractual" material

70. I begin by noting the observation of Andrew Smith J in *Phoenix Life Assurance v Financial Services Authority* [2013] EWHC 60 (Comm). The case concerned a different point of interpretation in a group of policies also designed to receive transfers that included GMPs from occupational schemes. He agreed that sales documents formed part of the factual matrix, but expressed doubt as to the weight that should be given to them:

> "Of course, all the policyholders had their own contracts with Phoenix, but (i) it will have been obvious to them that their bond had largely standard wording (subject to the individual details of the Schedule, including the selection of operative conditions), but (ii) they will not have known whether other policyholders had and were to have the same sales documents as them. They might rationally and properly have thought that they had a standard product and so what mattered is the words of the product itself, rather than the particular literature sent to them. In other words, to my mind some care is needed before interpreting what is obviously standard wording by reference to the personal circumstances of an individual consumer, such as the sales documents which, as far as any individual consumer knew, Phoenix might have provided to only some policyholders. This point is not met by evidence that all policyholders received materially similar sales documents because policyholders would not have known that."

71. The judge in that case was deciding a matter between the provider and its regulator, rather than provider and a single customer, as here. However, it is part of the factual matrix that Mr Harris' policy was a standard document that will have been entered into by different policy holders with different information made available to them by Aviva.

72. In this case, for the reasons that follow, I do not think that even if considerable weight is given to the "pre-contractual material" it strongly supports the approach that Aviva have taken in implementing the Policy's terms.

73. There are three references outside the Policy to the GMP being payable from 65: the Proposal refers to the amount of the GMP at state pension age; the RD570 gives

the date from which it is payable; the illustration says that the Policy will provide at least the GMP at state pension age.

74. There are two statements in the illustration that Aviva say support an understanding that the Policy benefits could be restricted at age 60. They are:

> "In order to meet the guaranteed minimum requirements it may be necessary to alter the mix of benefits."
>
> and
>
> "Providing your total Fund will guarantee pension benefits which are greater or equal to the GMP, all benefits may be taken before State Pension Age."

75. Neither of those amounts to a statement that it may not be possible to take the pension at age 65. The "mix" of benefits is a clear reference to cash and pension and implies nothing about timing. The second statement, in the context of a policy intended to be payable at 60 does not read as a restriction. It reads (as it was no doubt intended to, in relation to policies with a retirement age the same as state pensionable age) as a positive – as confirmation of flexibility.

76. The only allusion to a restriction is that the illustration suggested that no benefits would be payable other than the GMP at state pension age if growth was at 8.5%. It suggests that by implication rather than clearly, and it actually overstates the impact of the lower growth rate since, with smaller increases in payment, the GMP at 65 could have been covered by an annuity payable from 60. So a deduction drawn from it could be wrong.

77. On the other hand, the various documents contain clear statements that benefits will be payable at age 60. The Proposal was for a retirement age of 60. The technical specification says that the pension age must be the same as for the transferring scheme. It says, "At retirement you can use the full value of your Total Fund…" without any qualification concerning GMP other than in relation to the amount of cash that can be taken.

78. The illustration is also for a retirement age of 60. It says that a death benefit equal to the policy value is payable before age 60 (and so by implication not after). There is no warning concerning GMPs equivalent to the one concerning Inland Revenue limits.

The "with-profits context"

79. The Policy participated in a with-profits fund. Aviva invite me to take into account that a reasonable person aware of the background would have known that the cost of providing benefits whose value exceeds the capital sum attributable to the Policy would be to the detriment of other with-profit policyholders. That is true, of course. There is no question that the Policy contains a guarantee which is capable of "costing" more than the available share of the with-profits fund derived from the premium. Aviva would accept that - and the principle is not at issue. The question is the nature of the guarantee, not its existence.

80. To suggest that the Policy cannot be read so as to provide a guarantee which is "excessive" in some way is to beg the whole question, being what the guarantee is. Policyholders might reasonably expect that premiums were set at a level intended to cover the known guarantees. But as policyholders of Equitable Life found out, it is not impossible for an insurer to make contractual commitments that it did not intend or know about.

81. Those are my observations on the background. Of course the issue is not what would have been understood from the background alone. It is how the terms of the Policy would have been understood by a person aware of that background and it is to those terms that I now return.

The Policy

82. The "Benefit date" is fundamental to the Policy. It is, as the extract in paragraph 22 above clearly states, the date on which, in effect, the Policy matures and something happens. What happens is that the Policy proceeds are to be applied in accordance with Condition 7. Condition 7 provides that "so much as is appropriate" is to be used to provide an immediate annuity equal to the GMP. On the plain words, Aviva are in breach if there is no immediate annuity as much as they would be if the annuity is not equal to the GMP.

83. I respectfully disagree with the ombudsman of the Financial Ombudsman Service, who may not have had the benefit of arguments as forceful as Mr Harris', when she concluded that "so much as is appropriate" can mean that no proceeds need be used to provide an immediate pension at all. I say that because the Condition 7 requirement is not to provide *either* an immediate pension *or* the GMP; it is to use so much as is appropriate to provide an *immediate* pension *equal to* the GMP. An

immediate pension is a pension payable from age 60. (The balance of the capital sum – had there been any – is then applied "at the same date", which disposes of any doubt that the operative part of Condition 7 takes effect at age 60.)

84. There is no provision to use the proceeds at 60 to secure an annuity deferred to age 65 or to hold the policy proceeds beyond age 60. So either a deferred annuity is being bought, which the Policy does not plainly allow for, or the policy proceeds are being held in suspense, which the Policy also does not plainly allow for (and which would mean that it was technically at least uncertain that there was no excess over the sum needed at 65).

85. Aviva suggest that Policy Condition 7 implies the purchase of an "immediate deferred annuity" at age 60, equal to the GMP and payable from age 65. In pensions parlance, an immediate annuity is one that begins when the premium is paid; a deferred annuity is one that begins a future date determined when the premium is paid. Policy Condition 7 refers to an immediate annuity. The "immediate deferred annuity" that Aviva refer to is in reality no more than a deferred annuity, and would be inconsistent with the Policy.

86. The alternative, which Aviva suggest is the effect of what they have done, of permitting Mr Harris to defer his retirement with the befit of increased growth and an improved annuity rate is equally inconsistent with the Policy. It is also inconsistent with the facts. Policy Condition 9 (see paragraph 24) allows Mr Harris, if he is in employment past age 60, to *elect* to defer the date on which Policy Condition 7 is effective to that date he actually retires from employment (or 70 at the latest). I do not know if Mr Harris was in employment when he reached age 60, but he has made no election, and even if he had, he would have to remain in employment to age 65 for the Benefit Date to be postponed until then.

87. As an aside, if there had been a choice under the Policy between a deferred annuity payable at 65 and deferring annuity purchase to age 65, deferring purchase would not have been so obviously to Mr Harris' advantage as Aviva suggest. Essentially he would have been trading certainty of income from age 65 against risk in relation to future growth and annuity rate changes.

88. As a final point on Policy Condition 9, if it *had* been apt to allow deferment by Aviva, under its terms there would not have been a widow's pension payable on Mr Harris' death between 60 and 65. I do not think that Aviva are suggesting that there would be no such pension. Looked at one way, that is just another reason that Condition 9

should not be regarded as being capable of covering the present circumstance. Looked at in another, it suggests that not even Aviva really think that it has been applied – or at least, only as justification after the event.

89. In my judgment there is no provision of the Policy that is capable of being interpreted, on its face, to provide for a period of five years after the Benefit Date during which, at Aviva's instigation, no annuity is purchased, the Policy continues to participate in the with-profits fund and death benefits are payable as if before the Benefit Date.

90. I would go a step further than that and say that with a knowledge of the background previously discussed it would not be possible to conclude, even based on a very liberal reading of the wording of the Policy, that nothing was payable at age 60.

Contra Proferentum

91. There is a general rule of contract law that where there is lack of clarity the contract should be construed against the party that drafted it. It is generally accepted to be a rule of last resort. In this case I have found it impossible, taking an even-handed view of the contract in the context in which it was entered into, to establish what should have happened when Mr Harris reached 60. As I have already said, the Policy simply does not provide for the circumstances that have arisen.

92. Aviva are seeking to imply into the Policy provision that permits what they are doing but undermines the fundamental principle of the Policy that it matures at the Benefit date. In my view that would be an altogether new provision. If the Policy can be read in a way that does less violence to its terms, even if to Mr Harris' benefit, then it should be.

93. "Guaranteed Minimum Pension" under the Policy is not defined by reference to the guaranteed minimum pension under the legislation (the reference to the legislation in Condition 7 does not limit the definition; it adds to it in the one context that it is mentioned). As defined in the Policy the GMP is, as I have said, a stated amount in pounds and pence. That amount was no doubt originally calculated in accordance with the legislation and carries increases that are also consistent with legislation, but one does not have to look to the legislation to find out how much it is at any moment in time.

94. I find that Condition 7 can be given effect to by the policy proceeds being used to provide an immediate annuity to Mr Harris at age 60 of the GMP as calculated under

the definition of Guaranteed Minimum Pension under the Policy. That will give him five years' more payments than Aviva would wish, but it does not require anything to be implied into the Policy that is not already there, and it is consistent with its overall purpose.

95. That reading does in a sense create what Aviva describe as a "pseudo GMP" before Mr Harris reaches age 65. But that is to take the GMP under the legislation as if it were a pension in its own right. It is not. Mr Harris' GMP under the legislation was simply an amount of pension that his occupational pension scheme had to provide at state pension age and thereafter from time to time. The scheme's liability for it was discharged by entering into the Policy. There is nothing in the legislation that prevents an equivalent pension being paid earlier than age 65, and given that the Policy does not define the GMP in relation to statute, it should be read as requiring such a pension to be paid.

96. Mr Harris will have been caused some distress and annoyance on being told that he would not receive a pension at age 60, for which he should be appropriately compensated.

Directions

97. Within 21 days of this determination, Aviva are to secure an annuity, backdated Mr Harris' 60th birthday, equal to the GMP calculated from time to time in accordance with the Policy definition and including a contingent 50% widow's pension, if relevant.

98. Aviva are to add simple interest at the rate for the time being payable by the reference banks to each past instalment from the due date to the date of payment.

99. Within 21 days of this determination Aviva shall also pay Mr Harris £250 to compensate him the distress and inconvenience that has been caused to him.

Tony King
Pensions Ombudsman

11 December 2014