

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

<b>Applicant</b>	:	The trustees of the Scheme (the <b>Trustees</b> )
<b>PPF</b>	:	Pension Protection Fund (the <b>PPF</b> )
<b>Board</b>	:	The Board of the Pension Protection Fund (the <b>Board</b> )
<b>OPS</b>	:	The Brickbusiness Pension Scheme (the <b>Scheme</b> )
<b>Reconsideration Committee</b>	:	The Board's Reconsideration Committee (the <b>Committee</b> )
<b>Reconsideration Decision</b>	:	The Board's calculation of the pension protection levies for the Scheme in respect of the period 1 April 2008 to 31 March 2009.

The PPF Ombudsman has received a referral of a reviewable matter, following a decision by the Committee of the PPF dated 23 March 2009.

**REVIEWABLE MATTER**

1. The Trustees requested the Committee to reconsider the Board's calculation of the pension protection levy for the Scheme, in respect of the period 2008/2009, as set out in the invoice to the Trustees of the Scheme (the **Trustees**), dated 9 January 2009. This calculation is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004 (the **Act**).

**APPLICANT'S GROUNDS FOR REFERRAL**

2. The documents submitted to the Board satisfied their requirements and the legal opinion that had been obtained and provided complied with the Board's requirements as set out in the Board's contingent asset guidance (the **Guidance**).
3. The general reference by the PPF in its letter of 29 December 2008 is insufficient reason to explain the PPF's decision that the legal opinion from DLA Piper UK LLP (**DLA UK**) dated 26 March 2008 (the **English legal opinion**) did not opine on the matters as set out in the Type A certificate as per paragraph 2.3.1 of the Guidance.

4. The reference to paragraph 2.3.1 in the PPF's letter of 29 December 2008 is intended to be a reference to paragraph 2.3.1 of Appendix 3 to the Guidance, rather than, as the PPF's letter states, to paragraph 2.3.1 of the Guidance itself.
5. The English legal opinion and a legal opinion from DLA Piper Nederland NV dated 27 March 2008 (the **Dutch legal opinion**) were to the effect of the statements set out in paragraph 2.3.1 of Appendix 3 of the Guidance.
6. Those statements could have been made explicitly at the date of those opinions and throughout the period to the present date.
7. A valid, binding and enforceable guarantee has been submitted by the Trustees in the PPF's standard form which the Trustees could call upon.
8. Sub paragraph (i) of paragraph 2.3.1 of Appendix 3 to the Guidance suggests that the legal opinion should state that the Guarantee "is a legally binding, valid and enforceable obligation of the Guarantor." As the Guarantor in this instance is incorporated in the Netherlands, this opinion is provided in the Dutch legal opinion and in a telephone conversation with the PPF held on 6 January 2009, it was accepted that this would be covered by the Dutch legal opinion. Attention is drawn to paragraph 5 of section 7 which explicitly states that "the Guarantee has been executed in accordance with applicable law of the Netherlands and therefore constitutes the valid and legally binding obligations of Wienerberger B.V."
9. Sub paragraph (ii) of paragraph 2.3.1 of Appendix 3 to the Guidance suggests that the legal opinion may state that the Guarantee "is in the Pension Protection Fund's required form...". It is not necessary that this opinion be provided within the legal opinions themselves, as according to paragraph 3.4.1 of the Guidance, "a blacklined document showing the differences between the agreement and the PPF's standard form must be provided in all cases, unless the trustees and their lawyers specifically certify to the Board that the only changes made to the standard form, are to complete the details required in the agreement. Such confirmation of no changes could be included in the covering letter submitted with the documents or the legal opinion." The letter dated 28 March 2008 from DLA UK stated that the only changes to the PPF's standard form related to the names and details of the parties and the selection of options within the PPF's standard wording.

10. Sub paragraph (iii) of paragraph 2.3.1 of Appendix 3 to the Guidance suggests that the legal opinion states that the Guarantee “can be drawn against the liabilities of the Plan of any of the employers listed in Schedule I to the Guarantee, which schedule lists every undertaking which is identified by the company secretary as both “associate” of the Guarantor within the meaning set out in section 435 of the Insolvency Act 1986 and an “employer” in relation to the Plan within the meaning set out in section 318 of the Pensions Act 2004 and the regulations made thereunder.” Attention is drawn to paragraph 1.7.1 of Appendix 3 to the Guidance which states that the Board will not reject an opinion for not opining on this issue, provided that there is an officer’s certificate which confirms that schedule I to the Guarantee lists all such undertakings and the certificate is provided in conjunction with the legal opinion. At the time of submission an appropriate officer’s certificate was included. Paragraph 8 of the Officer’s Certificate states: “I confirm that the attached schedule of employers for the Plan lists every undertaking which is both an “associate” of the Guarantor within the meaning set out in section 435 of the Insolvency Act 1986 and an “employer” in relation to the Plan and within the meaning set out 318 of the Pensions Act 2004 and regulations made thereunder.” Attention is also drawn to paragraph 7.3 of the English legal opinion which expressly refers to the certificate.
11. The English legal opinion does reflect and comply with the statements set out at paragraph 2.3.1 of Appendix 3 to the Guidance. Sub paragraph (iv) of paragraph 2.3.1 of Appendix 3 to the Guidance suggests that the legal opinion states that the Guarantee “on its terms, will be unconditionally available to the Plan for so long as any actual or contingent liability of such employers to Plan subsists.” The legal opinions provided clearly state that the Guarantee constitutes the valid and legally binding obligations of Wienerberger B.V. in respect of the liabilities of Wienerberger Limited to the Plan and is unconditionally enforceable by the Trustees against Wienerberger B.V. in accordance with its terms. Section 6 of the English legal opinion confirms the unconditional legal enforceability of the Guarantee as a matter of English law. That section 6 confirms that no further action or approval is required to ensure the enforceability of the Guarantee. As the Guarantee follows the PPF’s standard form and is available to the Plan as long

as a contingent liability subsists, the opinions, by confirming that it is enforceable, satisfy this aspect of the Guidance.

12. The Guidance does not require the legal opinion explicitly to set out the statements in paragraph 2.3.1 of Appendix 3 to the Guidance word for word and it is sufficient for the legal opinion to confirm that the Guarantee is unconditionally valid and enforceable against the Guarantor, Wienerberger B.V. The legal opinion should not be rejected solely on the basis that it does not spell out word for word the matters set out at paragraph 2.3.1 of Appendix 3 to the Guidance.
13. Paragraph 1.5.3 (b) of Appendix 3 to the Guidance clarifies 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.”
14. Paragraph 1.8.1 of Appendix 3 provides that, “It would be impractical to produce standard forms of legal opinions to cover the many potential situations in which contingent assets may be put in place. In this appendix, there are examples of wording which would be acceptable to the Board together with those which are considered unacceptable to the Board...” The English legal opinion confirms that the Guarantee is unconditionally valid, binding, enforceable and that the English Courts have appropriate jurisdiction.
15. Paragraph 2.3.1 of Appendix 3 to the Guidance, which sets out the wording of the Certificate does not say that using the wording is the only way and confirms that, “This wording is perhaps the simplest way of meeting the Board’s requirements as it repeats the facts that the trustees are expected to certify.” Yet the decision of the PPF suggests that it is the only way.
16. Paragraph 3.1.4 of the Guidance refers to the need to provide a formal legal opinion covering “certain matters” set out in the certificate. This does not suggest that the certificate has to be repeated exactly in the legal opinion. The declarations given by PricewaterhouseCoopers in the certificate were based upon the legal opinions and documentation submitted to the PPF.
17. The Board’s Determination dated 19 February 2008 (the **PPF Determination**) in relation to the levy for 2008/09 does not state that the matters set out at paragraph 2.3.1 of Appendix 3 to the Guidance must be set out in the legal opinion.

18. Paragraph 15 of the Determination requires the PPF to take account of its published Guidance.

### **MATERIAL FACTS**

19. Section 1.5.3 of Appendix 3 to the Guidance deals with the opinion and paragraph 1.5.3.(b) states:

“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 that contingent asset. Hence the opinion should not be expressed to be limited in its purpose to the risk based levy calculation.”

20. Paragraph 1.8. of Appendix 3 to the Guidance posed the following question:

“Will the Pension Protection Fund be publishing standard form wording in relation to the legal opinions required to be provided in support of contingent asset certificates?”

And paragraph 1.8.1 presented the answer:

“No. It would be impracticable to produce standard forms of legal opinion to cover the many potential situations in which contingent assets might be put in place. In this appendix, there are examples of wording which would be acceptable to the Board together with those which are considered unacceptable to the Board. These are not intended to be used as standard wording but rather are intended to clarify some of the Board’s requirements for example what unconditionally available requires. These examples are in no way exhaustive or intended to cover all contingencies.”

21. Section 2.3 of the Guidance deals with the certification confirmation and paragraph 2.3.1 of Appendix 3 states:

“This wording is perhaps the simplest way of meeting the Board’s requirements as it repeats the facts that the trustees are expected to certify in relation to a Type A guarantee. Obviously the wording would need to be adapted to reflect the matters which must be certified for other contingent asset types.

“On the basis of, and subject to, the foregoing and the matters set out in [X] below and any matters not disclosed to us, and having regard to such considerations of English law in force as at the date of this letter as we consider relevant, we are of the opinion that the Guarantee:

(i) is a legally binding, valid and enforceable obligation of the Guarantor;

(ii) is in the Pension Protection Fund’s required form for such documents (as published on its website as at the date of this letter) subject only to [example of difference], which does not have a materially detrimental effect on the rights of the trustees of the Plan as compared with the required form.””

22. Paragraph 3.1.4 of the Guidance states:

“The trustees will also need to supply hard copies of various documents to the Board, as specified in the notes to the relevant certificate, in support of certain declarations made in the certificate. In all cases a certified copy of the executed legal agreement (showing all relevant signatures/seals etc) is required, together with a formal legal opinion covering certain matters set out in the certificate, and a document showing the differences from the Pension Protection Fund’s required form. If there are no differences from the standard form, this should be confirmed in writing as part of the legal opinion or in a separate letter. If the appropriate documents are not supplied, the certificate will be rejected by the Board and no credit will be given in the risk based levy calculation.”

23. Paragraph 15 of the PPF Determination states:

“In the event of any inconsistency between the Determination (including this Schedule and the Appendices) and the notes accompanying any of the certificates referred to in this Determination, the terms of the Determination shall prevail. In determining whether it is satisfied as to any matter set out in the Determination, the Board will take account of any guidance which it is

published (including guidance in the form of “Frequently Asked Questions”).

24. The Trustees submitted a Guarantee, namely a parent company guarantee (the **Guarantee**) dated 26 March 2008 by Wienerberger B.V. in favour of the Trustees to be considered as a Type A contingent asset.
25. The covering letter dated 28 March 2008 stated:

“We enclose the following:

  - a certified copy of the Guarantee;
  - a blacklined document showing the differences from the Pension Protection Fund’s required form for such documentation as published on its website;
  - a copy of the legal opinions; and
  - a copy of the officer’s certificate.”
26. Along with the application the Trustees submitted:
  - a certified copy of the Guarantee;
  - English legal opinion dated 26 March 2008 and Dutch legal opinion dated 27 March 2008 which stated “which together confirmed that the Guarantee is unconditionally valid and enforceable by the Trustees against the Guarantor, Wienerberger B.V.”; and
  - an Officer’s Certificate by Mr Koekoek of Wienerberger B.V., confirming that the schedule attached to the English Legal Opinion lists every undertaking which is both an “associate” of the Guarantor within the Insolvency Act 1986 meaning and an “employer” in relation to the Scheme within the meaning set out in the Pensions Act 2004 and regulations made thereunder.

27. An on-line certificate was also completed and submitted by e-mail in the accepted way by PricewaterhouseCoopers on behalf of the Trustees. The certificate requires the following certification:

“c) The guarantee

i) is a legally binding, valid and enforceable obligation of the Gurantor;

ii) is in the Pension Protection Fund’s required form for such documents (as published on its website as at the date on which the guarantee was entered into), subject only to variations which have been or will be notified to the Board of the Pension Protection Fund by midnight at the end of 31 March 2008 and which do not have a materially detrimental effect on the rights of the trustees as compared with the required form;

iii) can be drawn against the liabilities to the scheme/section of any of the employers listed in Schedule I to the guarantee, which schedule lists every undertaking which is both (A) an “associate” of the/any Guarantor within the meaning set out in Section 435 of the Insolvency Act 1986, and (B) an “employer” in relation to that scheme/section within the meaning set out in Section 318 of the Pensions Act 2004 and regulations made thereunder; and

iv) on its terms will be unconditionally available to the scheme/section for so long as any actual contingent liability of any such employers to the scheme/section subsists.

d) The declarations made in (c) above are given on the basis of a legal opinion received from an appropriately qualified person and are made subject only to the assumptions and qualifications specified in that opinion.”



28. On 23 April 2008, the PPF acknowledged the documentation and on 29 December 2008 informed the Scheme that it had not satisfied the Board's requirements for recognition of a Type A contingent asset. It stated:

“The principal reason for the Board's conclusion is that the English legal opinion does not opine on the matters as set out in the Type A certificate as per paragraph 2.3.1 of the Board's Contingent Asset guidance.”

29. The Trustees state that the reasons given by the PPF were somewhat obscure and telephoned them on 6 January 2009 seeking clarification. The Trustees state:

- the purpose of this call was to clarify whether a confirmatory legal opinion confirming to the PPF the matters set out in paragraph 2.3.1 of Appendix 3 to the Guidance, could be provided to deal with the issue which the Board appeared to be chiefly concerned;
- the PPF agreed to check whether the Board would accept such confirmatory legal opinion; and
- the PPF accepted that the Dutch legal opinion complied with paragraph 2.3.1 of Appendix 3 to the Guidance.

30. On 8 January 2009, the Trustees submitted a further legal opinion in essence asserting that the legal opinion provided in March 2008 had satisfied the terms of the Guidance and in respect of the English legal opinion and the Dutch legal opinion confirmed that:

- those opinions were to the effect of the statements set out in section 2.3.1. of the Guidance, subject to the assumptions and qualifications in those opinions; and
- those statements could have been made explicitly at the date of those opinions and throughout the period to the present date.

31. Attention was drawn to an opinion provided at paragraph 4.4 which stated:

“4.4 the Guarantee is in the Pension Protection Fund's required form for such documents (as published on its website on the date of the Guarantee) (in terms of paragraph (a) (ii) of section 2.3.1 of the Guidance).”

32. On 21 January 2009, the Trustees applied for a review. The Trustees argued that their legal opinions were not required to set out word for word the matters stated in paragraph 2.3.1 of Appendix 3 to the Guidance and the PPF's decision letter of 29 December 2008:
- was in breach of the terms of the PPF Determination and had failed to follow or properly take account of the Guidance; and
  - failed to give adequate or clear reasons.
33. On 23 March 2009, the PPF wrote to the Trustees stating that the Board had decided that the invoice had been calculated correctly and stated the following reasons for the decision:
- the Type A contingent asset certificate at Annex C to the Determination requires trustees to certify the matters set out at paragraph (c) of the "Certification" section on the basis of a legal opinion and that legal opinion is satisfactory to the Board;
  - it was not compulsory for the legal opinion to replicate the wording at paragraph 2.3.1 of Appendix 3 to the Guidance but the legal opinion must, however, address the substance of the matters set out in paragraph (c) of the Certification section of the contingent asset certificate;
  - the Guarantee is governed by English law and is available for the benefit of an English pension scheme. An English legal opinion is required, in addition to a Dutch legal opinion, to opine upon whether the guarantee is a legally binding, valid and enforceable obligation of the Guarantor under English law;
  - during the telephone conversation of 6 January 2009, the PPF accepted that the Dutch legal opinion would address the requirement that the Guarantee is a valid, binding and enforceable obligation of the Guarantor but also that an English legal opinion would have to opine on matters set out in the Guidance;
  - the English legal opinion dated 26 March 2008, did not opine on the issue of whether the guarantee is in the PPF's required form and whether any variations have a materially detrimental effect on the rights of the trustees;

- paragraph (c)(ii) of the Certification section to the Type A contingent asset certificate requires that the trustees declare that:
  - (a) the guarantee can be drawn against the liabilities to the Scheme of any of the employers listed in Schedule I to the guarantee; and
  - (b) Schedule I lists every undertaking which is both an “associate” of the Guarantor and an “employer” in relation to the Scheme.
- the declaration at (a) above is a question of law and paragraph 1.7.1 of Appendix 3 to the Guidance does not permit the Scheme to submit an officer’s certificate in place of a legal opinion on the issue and the English legal opinion did not opine on this issue of law;
- paragraph (c)(iv) of the certification section to the contingent asset certificate requires that the trustees declare that the guarantee will be unconditionally available to the Scheme for so long as any actual or contingent liability of any of the employers to the Scheme subsists, paragraph (d) requires that this declaration be given on the basis of a legal opinion but the legal opinion dated 26 March 2008 did not opine on this matter;
- the Scheme did not submit an English legal opinion dealing with the matters set out in the Certification section of the contingent asset certificate before midnight on 31 March 2008;
- a legal opinion supporting the conclusion that a valid, binding guarantee had been submitted on 8 January 2009, but was not supplied by the deadline specified in the Determination.

## **RECONSIDERATION DECISION**

34. On 16 April 2009, the Trustees made an application to the Committee and on 6 November 2009, the Committee upheld the Review decision and the original calculation of the levies for the Scheme.
35. The Committee found that opining on the certification requirements was mandatory and determined that a failure to opine on the certification requirements would render the certificate as being improperly given.

36. The Committee did not accept the Trustees' submissions that the requirement to confirm that the Guarantee did not depart from the Board's standard form could be taken from the covering letter and could not see any way in which those words could be said to represent a legal opinion as to whether any departures from the standard form were materially detrimental as compared to the standard form.
37. The Committee found that discussions with members of the Board staff which took place after the date for submission of contingent asset documentation could not assist the Trustees' application.
38. The Committee concluded:
- the Schedule to the PPF Determination had made provision to enable a calculation to be performed and a discretion under paragraph 5 was not relevant;
  - the information the Board had received was not incorrect, rather the information did not comply with the conditions for recognition of contingent assets and a discretion under paragraph 6 was not therefore relevant;
  - paragraph 13 of the Schedule to the PPF Determination was not relevant: although it allowed the Board to use equivalent information it was under no obligation to do so and the Board had such information as was necessary under the terms of the PPF Determination to calculate the invoice.

#### **Submissions from the Trustees**

- paragraph 24 of the Committee's decision omits the reference to a "...notification required by or under a certificate in relation to contingent assets has not been duly given";
- the Guarantee was in the Board's standard form and it was unnecessary for any legal opinion, whether English or Dutch, to confirm that this was the case (paragraphs 2.3.1 and 3.4.1 of Appendix 3 to the Guidance refer). The Board should have had no difficulty in comprehending that to be the case or in enabling them to act quickly;

- there was no “precondition” that a “satisfactory legal opinion” be provided to the Board and the PPF Determination did not state that inclusion of the confirmation in a legal opinion was mandatory;
- the PPF Determination did not stipulate that confirmation could be given in a legal opinion, or as an alternative, in a covering letter;
- paragraph 3.4.1 of the Guidance unambiguously makes plain, confirmation could (not should) be given in one of the two ways referred to and it follows that it equally could be given in some other manner;
- Appendix 4 does not prescribe the contents of any legal opinion. The Type A certificate is a document which was drafted by the Board and it was incumbent on the Board to ensure that the language used in it was clear and unambiguous;
- Note 3 of the certificate’s “Accompanying Notes” which is careful to draw a distinction between “confirmation that there are no changes to the required form” and “a copy of the legal opinion”, both of which are to be submitted with the certificate; i.e. the two are, and are clearly expressed to be, distinct;
- the Trustees disagree that letter dated 8 January 2009 is not capable of constituting “information” and disagree with the distinction drawn by the PPF between “a mere piece of information” and “an essential precondition” and paragraph 4.4 of the English legal opinion satisfied the dictionary definitions of “information”;
- in a previous determination relating to the G C Bateman Group of Companies Pension and Life Assurance Scheme, by the then Deputy PPF Ombudsman, the over arching nature of the discretion conferred by paragraph 6, was established; and
- the discretion under paragraph 12 is exercisable “at any time prior to the calculation or recalculation of the levy”, not prior to the deadline as stated by the PPF.

**Submissions from the PPF**

- recognition of contingent assets in the levy calculation is a concession, not a right;
- the notes to the certificate require the Trustees to send, before the deadline, either a blacklined document showing the changes from the required form, or else confirmation that there are no changes. A blacklined document was sent, but confirmation was not;
- the Board had been provided with English and Dutch legal opinions prior to the relevant deadline. The further opinion amounted to changing (by supplementing) the legal opinion given to the Trustees. A change of that kind is something different in nature from the giving of information to the Board;
- a discretion under paragraph 6 does not apply as the information was not in itself incorrect. The Trustees refer to the words in paragraph 6 of the PPF Determination that speak of the case where a notification required by or under a certificate “has not been duly given”. The purpose of these words is to allow for a review where a levy calculation has been based upon a certificate that it later turns out was not duly given. They are not words which can automatically be relied upon by any scheme which fails to provide a proper certificate or proper supporting information at the proper time;
- if any discretion did arise under paragraph 6 there are further questions that would need to be asked such as to identify the reasons why the Trustees’ legal advisers did not follow the Guidance. It must not be forgotten that there is an important general interest in having clear rules which are even handedly applied to all schemes and in deadlines being enforced; and
- a discretion under paragraph 12 does not apply:
  - it was a precondition to the existence of an effective contingent asset that there should have been supplied, by the deadline, a certificate supported by a satisfactory legal opinion. The requisite legal opinion did not exist by the contingent asset deadline;

- although the Trustees argue that the Guarantee was in the standard form and there was no need for the issue of material detriment to be addressed, the legal opinions provided did not say that. Of importance to the Board is that it is able to identify quickly and unambiguously whether a legal opinion has dealt with all the requisite issues. This is achieved if the opinion says either that the Guarantee is in the required form or else identifies the changes and says they do not have a material effect. The Board should not itself have to undertake the task of comparison between the Guarantee and the required standard form; and
- no employee of the Board, any more than the Board itself, has any power to depart from the PPF Determination. If (as is the case) this was not in fact a case of obtaining further information. The response provided by the PPF during the discussion held on 6 January 2009 was simply to agree to check whether a confirmatory legal opinion would be accepted. There is no suggestion of any further communication to say that it would in fact be accepted.

## **CONCLUSIONS**

39. 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 calculation of the levy required of the Scheme in the financial year 2008/2009.
40. There are two issues. Firstly, whether as DLA UK for the Trustees maintain, the application for a contingent asset, comprising a Type A Guarantee to be taken into account made on 28<sup>th</sup> March 2008 was made in a form and to a timescale that meant the PPF should have taken it into account, or, as the PPF maintain, whether the application was in some way defective or not within that timescale.
41. Secondly, whether as DLA UK for the Trustees maintain, information subsequently provided, anyway, clarified the position and the PPF had discretions available to them to then take this subsequent information into account and approve the application.

42. I first note that the Board publishes the timetables it adheres to on its website so pension funds know the date by which information has to be provided for it to be taken into account. I also note it is clear the deadline of 31<sup>st</sup> March is strictly applied. The PPF have made this point in submissions, it is something that has been accepted by my office and appears to be accepted by DLA UK on behalf of the Trustees. Indeed it is agreed the application was made on 28<sup>th</sup> March 2008 within the deadline set.
43. I next note that the Board of the PPF published guidance regarding to contingent assets in November 2007. They updated that guidance in February 2008. Again this is agreed by the parties. The dispute is, in part, over application of that Guidance. I state therefore only that publication of guidance is good practice. It clearly aims to and does assist pension fund trustees to provide what the PPF require.
44. Turning to the Guidance, at Section I, it is clear the February 2008 Guidance largely follows the previous edition's format. Adjustments relate to taper provisions. I note too it is written in plain language and stated to be aimed at trustees (Section I.2 makes this very clear). Section I also makes it clear that a Type A guarantee can create a complete "risk switch". It follows that it is clear to all trustees that this is potentially advantageous if used correctly. Moreover that the advantage and, critically, the way in which it can be obtained is not wholly new. The PPF appear to have acted correctly. I note indeed that no argument is raised that the barriers to be crossed were not set out in time and clearly.
45. I note further that at section I.I.II, once in place recognition of relevant assets may continue. It follows it is clear that it is important to get any application right.
46. By Section 2 the Guidance makes it abundantly clear that "The Board [of the PPF] only recognises contingent asset arrangements that are put in place using standard forms of documentation published by the Board." They go on to explain that this reduces their administrative burden. As they have stated in submissions to me, they do not have capacity to check detailed adjustments. Fair notice is therefore given, and again DLA UK for the Trustees accept this as they



maintain, at least in part, that they submitted standard documentation. I note too the Board helpfully provide draft standard documents.

47. By Section 2.1.3, which is in effect the critical section, the Guidance states that only changes that do not have a materially detrimental effect are allowed to the standard documents, and where such changes are made “the trustees must provide to the Board a clear statement of the changes and the formal legal opinion will need to confirm that the changes do not have a materially detrimental effect.” Section 2.1.4 places the obligation to decide if changes are material upon trustees and their advisors, section 2.4 helpfully stresses the importance of the legal opinion, and Appendix 3 sets out in more detail what is required.
48. The documentation that had been submitted by the due date was not ‘incorrect’ in a material respect. It was therefore sufficient for the purposes of the PPF making a decision about whether the contingent asset could be taken into account or not. A discretion under paragraph 6 did not, therefore, arise.
49. The application failed because the declaration made at c (ii) of the certificate was not supported by the legal opinion that had been provided by the due date.
50. This was remedied when a further legal opinion was provided in January 2009 and DLA UK stated that the Guarantee was in the standard form by letter of December 2009 at paragraph 52 and letter of 20<sup>th</sup> May, paragraph 17. However, that does not assist the trustees in this case. The overarching nature of paragraph 6 would only render it applicable where the Board might receive information late which leads it to conclude that the information it held was incorrect, such that it would need to invoke paragraph 6 to review the calculation. The information already held was not incorrect and the information subsequently provided was not correcting that information in any way and offered no scope therefore for the overarching nature of paragraph 6 to apply.
51. A discretion under paragraph 12 only applies in instances where the Board has requested additional information but specifically provides that there should be no obligation on the Board to seek further information where that information had not been provided. A discretion under paragraph 12 did not, therefore, arise.

52. Likewise, paragraph 13 provides for the Board to use equivalent information, but imposed no obligation for it to do so and I cannot see that there would have been an obligation for them to have done so in this case.
53. This evidence supports the view that the PPF reached a correct decision that the submissions made before 31<sup>st</sup> March 2008 did not match their requirements and although subsequent information remedied that position, the circumstances did not provide the conditions necessary for the discretions available to apply.
54. As to arguments raised regarding statements by a staff member of the PPF during a telephone conversation, I see nothing in the accounts of this call that indicate that the PPF acted wrongly.
55. It follows that I see nothing in all the very complicated arguments put to me that justifies my remitting this back to the Board of the PPF so they can reconsider the case.
56. I would only note that, as DLA UK argue, the PPF might have explained their reasoning better and should not, in my view have slightly confused the latter by referring to the trustees having been given a concessionary benefit to have the guarantee taken into account. The Guidance infers that if everything submitted is in the form required will be taken into account by paragraphs 1.1 and 1.1.3. I highlight this to assist only.

**JANE IRVINE**

Deputy Pension Protection Fund Ombudsman

18 March 2011