

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

- Applicant** : Mr J A Jolliffe, on behalf of the Trustees of the Northampton Machinery Company Limited and Associated Companies Pension Fund (the **Trustees**)
- Scheme** : Northampton Machinery Company Limited and Associated Companies Pension Fund

1. The Pension Protection Fund (**PPF**) Ombudsman has received a reference of a reviewable matter, following a decision by the Reconsideration Committee of the PPF dated 11 December 2007.

RECONSIDERATION DECISION

2. The Reconsideration Committee decided:
 - 2.1. The reviewable matter to which the Applicant's request for reconsideration related is the PPF Board's (the **Board**) calculation of the pension protection levies for the Scheme in respect of the period 1 April 2006 to 31 March 2007, as set out in invoice number 100119900-000-07-01, dated 1 December 2006.
 - 2.2. This calculation is a reviewable matter by virtue of paragraph 19 of Schedule 9 of the Pensions Act 2004.
 - 2.3. The Applicant has requested that the Committee accept the Section 179 valuation and recalculate the levy. The grounds for the request are as follows:
 - (a) The Scheme was in substantial surplus as at 31 March 2006 when valued on the Section 179 basis. This was substantiated by the "certified Section 179 valuation certificate", dated 9 May 2007, with an effective valuation date of 31 March 2006. Reference to an uncertified certificate with no effective date of valuation is, therefore, incorrect.

- (b) The Scheme will shortly be wound up and the payment of the levy (£10,907.73) will reduce the benefits for members, whose benefit expectations have already been curtailed by the closure of the Scheme in 2000 and the subsequent loss of employment.
- (c) The Board have been informed that the Scheme will not become their responsibility because it can provide benefits in excess of those provided by the PPF.
- (d) The Board had been advised, on a number of occasions, that the Scheme was in surplus. For example, e-mails dated 20 February and 29 March 2006 and letters dated 21 December 2006, 12 and 22 January and 9 May 2007.
- (e) A response from the PPF, dated 20 March 2006, indicated that Section 179 valuations were not expected to be completed in every case. If it had been indicated that the PPF might not accept the professional opinion of an experienced actuary, then a Section 179 valuation would have been completed.
- (f) Any possible doubts about the asset position of the Scheme would have been dispelled by the e-mail of 29 March 2006, which said that members' benefits were largely fully secured in a with-profits policy with Zurich Insurance Company Limited (**Zurich**).
- (g) The PPF and the Review Board failed to understand the nature of the request for Review. It is accepted that the Scheme is eligible for the levy and that the making of the Board's determination under Section 175(5) of the Pensions Act 2004 is not a Reviewable Matter. However, the calculation of the levy failed to take into account the fully insured guaranteed pensions secured by the Trustees for each member of the Scheme.
- (h) Section 7(2)(c) of the Pension Protection Fund (Valuation) Regulations 2005 states that, if the surrender value of the contract of insurance does

not accurately reflect the actual value at the relevant time, then the valuer shall adopt such value which appears to him to be appropriate. The wording is a little loose in that it appears to give total discretion to the valuer to adopt any value. There is only one appropriate value, which is to determine the value of the pension secured for a member under the insurance policy contract on exactly the same basis as the value placed on that member's accrued pension entitlement. If the member's pension entitlement was matched by the pension secured for him in the policy, the value of the assets would equal the value of the liability. In the case of a with-profits policy, consideration could be given to making allowance for future bonuses.

- (i) As an example, two of the Scheme's members have pensions secured under the insurance policy which match 100% of their entitlement. The Board's system of valuation would produce a deficit in their cases, based on the protected liabilities, which are only 90% of their entitlement. This is not only unfair, but "plainly ridiculous".
- (j) The Board was informed, by e-mail on 29 March 2006, that the Scheme members' benefits were secured by a with-profits policy. This fact should have been taken into account by the actuary who determined the "underfunding risk factor calculations".
- (k) No comment was made in response to the 29 March 2006 e-mail so it was reasonable to assume that the facts contained therein had been accepted.
- (l) Letters dated 21 December 2006 and 22 January 2007, together with the application for review, contained unmistakable references to the pension secured in respect of members of the Scheme.
- (m) The whole problem could have been avoided if the Board had accepted the Applicant's offer to undertake a Section 179 valuation.

- 2.4. The factual background was as follows:
- (a) The relevant scheme return was dated 24 August 2005. The Scheme is a single employer scheme. The employer is Northampton Machinery Limited, which had a failure score of 88.
 - (b) The Trustees did not submit a Section 179 valuation, a Contingent Asset Certificate or a Deficit Reduction Certificate before the relevant deadlines.
 - (c) A Section 179 valuation certificate, dated 9 May 2007, was received on 10 May 2007. The nature and content of the certificate was a matter of dispute.
 - (d) The Applicant disputed the use of the Minimum Funding Requirement (**MFR**) valuation data as at 5 April 2003 in calculating the levies.
- 2.5. In addition to the formal consultation process undertaken by the Board, substantial efforts were made to publicise the Board's proposals and the implications for schemes and their advisers. These included a number of communications and reminders to the industry and a series of roadshows at various locations around the UK.
- 2.6. The scope of the review should be whether the calculation in respect of the Scheme's levy invoice was carried out in accordance with the published Determination (the **2006 Determination**). The Committee did not have any discretion to depart from the 2006 Determination in calculating the amount of the levies.
- 2.7. Paragraph 2 of the Schedule to the 2006 Determination makes it clear that "save where otherwise stated, all the matters referred to in this Schedule shall be assessed, measured or quantified in accordance with the factual position as it existed at 31 March 2006".
- 2.8. There were a number of specific issues raised in the reconsideration application to which the Committee responded as follows:
- (1) Whether the Notice of Decision was factually incorrect.

The Committee observed that the Section 179 valuation certificate, provided in May 2007, does not appear to have an effective date for valuation and that the check box had not been completed in the certification section of the Section 179 valuation certificate. The Committee concluded that, for these reasons, the Notice of decision had stated that the Section 179 certificate was uncertified and had no effective date of valuation.

- (2) Whether it was unfair for the Scheme to be levied because the Board would have no liability following winding up.

The fact remained that the Scheme had not yet been wound up. It was an eligible scheme and remained an eligible scheme throughout the 2006/7 levy year. The Schedule to the 2006 Determination did not provide for any different treatment for a scheme which might shortly be wound up or otherwise cease to be eligible. The Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006 provided for a scheme which ceased to be eligible part way through a levy year to be liable for the full amount of the levy for that year.

- (3) The February 2006 e-mails.

The Committee noted that the Board's e-mail of 13 February 2006 had explained that MFR data would be used to calculate the levy where a scheme did not provide a Section 179 valuation before 31 March 2006. The response to the Applicant's e-mail, of 20 February 2006, explained that the purpose of the previous e-mail was to ascertain whether the Scheme intended to submit a Section 179 valuation. It was for the Applicant and the Trustees to form a view as to whether to complete a Section 179 valuation.

The response did indicate that the Board did not expect every scheme to undertake a Section 179 valuation, but it did not suggest that the Board would accept a Section 179 valuation after 31 March 2006 or, in

the absence of such a valuation, that it would use any data other than the MFR data.

Paragraph 8 of the Schedule to the 2006 Determination specified that the Section 179 valuation must be submitted on or before 31 March 2006 for it to be included in the levy calculations.

The factual position of the Scheme as at 31 March 2006 must be evaluated in accordance with the 2006 Determination.

The fact that the Applicant had provided information that the benefits were secured by insurance policies does not alter the fact that the Scheme did not submit a Section 179 valuation on or before 31 March 2006. Paragraph 9 of the Schedule to the 2006 Determination provided that, in the absence of such a valuation, the Board was required to use the latest MFR data available from the scheme return.

(4) Valuing the members' benefits.

The Applicant had explained that the members' pensions had been secured in a with-profits policy with Zurich. The Committee noted that, where trustees had secured members' benefits by way of an insurance policy in the name of the trustees, the trustees had not discharged their liability to and in respect of those members. In addition, the value of the policy to which the Applicant had referred can vary and does not guarantee the members' benefits.

The basis upon which a Section 179 valuation is carried out is set out in legislation and guidance which the Board is required by law to issue. The purpose of a Section 179 valuation is to assess a scheme's funding against the compensation which would be payable should the Board assume responsibility for the scheme. The level of compensation payable by the Board and the treatment of insured assets are prescribed by legislation. The asset and liability values used for the

purposes of the levy calculation were set out in the Schedule to the 2006 Determination.

(5) The use of MFR data.

The Board had notified the Applicant of the position with regard to the use of MFR valuation data. The Schedule to the 2006 Determination prescribed that, where no Section 179 valuation had been provided, the MFR valuation data would be rolled forward in accordance with the methodology set out in Appendix 2 to the 2006 Determination.

The Applicant submitted that it was reasonable to assume that the facts contained in his e-mail of 29 March 2006 had been accepted. Regardless of whether such an assumption was reasonable, the information was not information which the Schedule to the 2006 Determination permitted to be taken into account.

(6) Whether the determination of the levy was correctly made.

The factual position of the Scheme as at 31 March 2006 must be evaluated in accordance with the Schedule to the 2006 Determination.

2.9. Paragraph 5 of the Schedule to the 2006 Determination provided that, in the event that any situation arises for which the Schedule failed to make the provision required for a calculation to be performed, the Board had the discretion to perform the calculation of the levies in such manner as, in the opinion of the Board, was reasonably practicable and best gave effect to the general approach laid down by the 2006 Determination. Paragraph 5 was not relevant in this case because the Schedule made the provision required for a calculation to be performed; as evidenced by the issue of an invoice.

2.10. Paragraph 6 of the Schedule stated that nothing in the 2006 Determination should prevent the Board from reviewing the amount of the levies where it subsequently appears that the information upon which the calculation was based was incorrect in a material respect. The levy calculation had been performed in accordance with the Schedule to the 2006 Determination and the

MFR valuation data as at 5 April 2003 was not incorrect. Paragraph 6 was not relevant.

- 2.11. Paragraph 11 of the Schedule stated that the Board may take steps to obtain further or amended information. In the interests of fairness across all levy payers, the Board had not accepted voluntary information after the deadline where the applicant was simply late in providing information or had realised that it would be in their interests to update the information.
- 2.12. The Reconsideration Committee upheld the original calculation of the levies for the Scheme.

APPLICANT'S GROUNDS FOR REFERENCE

3. The Applicant submits:
 - 3.1. The Reconsideration Committee considered the Section 179 Valuation Certificate invalid because it was not signed or dated. However, the relevant date (31 March 2006) was included in the valuation details and the certification box was completed. The Certification box did not have a space for signature so he did not sign it.
 - 3.2. He notes that there was a box entitled "Effective date of this valuation", which should have been completed and apologises that it was not. His file copy of the certificate shows this box completed so he assumes that an earlier version was submitted by mistake.
 - 3.3. The Reconsideration Committee were supplied with a full Section 179 valuation and they do not claim that the valuation is incorrect. Their grounds for rejecting it are inappropriate and unfair, in view of the fact that members' benefits on winding up will be reduced if the incorrect levy is paid.
 - 3.4. He has never said that the Scheme should be exempt from the levy because of its solvency position or its impending wind up. His reference to the winding up was to highlight the fact that the Scheme will not form a liability for the

PPF as would have been the case if the solvency position had been as the PPF had determined (56.4%).

- 3.5. The response he received to his e-mail of 20 February 2006 did not say that a Section 179 valuation should be made and suggested that it was not required. Since the PPF had been advised that the Scheme was in surplus, he took the e-mail to indicate that a valuation was not required and confirmed this by e-mail on 29 March 2006.
- 3.6. He has the right to assume that the answer to his e-mail was an acceptance by the PPF that a Section 179 was not necessary and that his assertion that the Scheme was in surplus had been accepted.
- 3.7. The PPF were in error in not asking for a valuation following his contention that the Scheme was in surplus.
- 3.8. It must have been the aim of the PPF to produce a method of determination which would produce an approximate valuation result as near to the actual valuation result as possible. They should, therefore, concede that the determination procedure was inappropriate in this case and would produce an inaccurate approximation to the actual valuation result. They should use their discretion, under paragraph 5 or 6, to call for a Section 179 valuation.
- 3.9. The Reconsideration Committee say that Regulation 7(2)(c) of the PPF (Valuation) Regulations only applies to the completion of Section 179 and Section 143 valuations. They say that it does not apply to the 2006 Determination. It should have done so. He does not suppose that the draftsmen had considered this aspect in drafting the regulations. However, to use an error in the wording of the regulations as justification for retaining a substantially inaccurate method of determining an approximate valuation result does not accord with the principles of fair play.
- 3.10. The members' benefits are secured in a policy with Zurich and are fully secured and guaranteed. The only way that the pensions would not be paid at the guaranteed amount is if the Trustees surrendered the policy, but this would

never happen. If it did, the members would have the right to sue the Trustees on the grounds of incompetence. The amount of the pensions cannot be varied except upwards in the event of future bonuses.

MATERIAL FACTS

4. In response to a request from the PPF, dated 17 January 2006, Mr Jolliffe sent them an e-mail, on 18 January 2006, saying,

“Thank you for your e-mail of 17 January, in which you ask me to let you know by 20 January, whether I will be submitting a Section 179 Valuation Certificate in respect of the above Scheme by 31 March 2006.

It is not clear from your e-mail when you expect the valuation date to be. I will assume therefore that the valuation date will be April 2005 unless you advise me to the contrary.

I can confirm that I expect to be able to complete a valuation certificate by 31st March 2006, on the basis that the valuation date is 6th April 2005.”

5. On 6 February 2006, the Faculty and Institute of Actuaries (the professional body for UK actuaries) sent an e-mail to scheme actuaries at the request of the PPF. The e-mail explained that its purpose was to alert actuaries to a data cleansing exercise to be undertaken by the PPF and to the Section 179 valuation timescale. The e-mail said,

“3. A crucial part of the levy calculation for an individual scheme is an estimate of the funding deficit or surplus as at 31 March 2006.

4. Much of the information needed for this estimate derives from the scheme return that has been sent to the Pensions Regulator.”

6. In February 2006, the PPF sent out two fact-sheets to schemes which explained how the levies would be calculated. Fact-sheet 1/05 included an explanation of the underfunding risk to be included in the calculation of the risk-based levy. It said,

“Underfunding risk will be measured by taking account of the difference between the value of a scheme’s assets ... and the value of its Pension Protection Fund liabilities.

...

Scheme funding information on a section 179 basis ... should be provided to the Pension Protection Fund by 31 March 2006 ...

For schemes that are unable to produce a section 179 valuation for the 2006/07 levy calculation, the Pension Protection Fund will adapt the results from the scheme's most recent Minimum Funding Requirement (MFR) valuation ...”

7. On 13 February 2006, the PPF sent an e-mail to Mr Jolliffe, as the Scheme Actuary shown on the scheme return. The e-mail said,

“... The data in the Scheme Return will be used by the Board of the [PPF] in the calculation of the 2006/07 pension protection levies.

The [PPF] is currently undertaking an exercise ... to ensure that the information is complete and accurate prior to calculating the 2006/07 pension protection levies ...

If you have previously been contacted and asked whether you will be submitting a section 179 valuation for this scheme before March 2006, and you replied “Yes”, then any aspects of the MFR valuation data provided on the Scheme Return which we would otherwise have queried have been excluded from this email ... Where the Board receives a section 179 valuation by 31 March 2006 the MFR valuation data will not be used in the calculation of the scheme's levy.

How should I respond to this e-mail?

Please reply by return email either confirming the data set out below or providing data where it is missing or inaccurate. You may also provide more recent data if you choose.

...

The data you provide will ensure that the levy calculation is as accurate as possible ...”

8. Mr Jolliffe responded, on 20 February 2006,

“The membership data you have on your file relates to the position at 5 April 2005, whilst the MFR valuation data relates to the position as at 5 April 2003.

We are due to undertake a valuation ... as at 5 April 2006, which should be available shortly after that date.

I do not believe that the solvency position of the Fund will have changed materially from that shown as at 5 April 2003, so that I would expect that there will still be a surplus at that date.

In these circumstances, do you still wish me to carry out a Section 179 Valuation?"

9. In a response dated 20 March 2006, the PPF said,

"We had been contacting scheme actuaries to find out whether or not they were planning to complete a section 179 in respect of the particular scheme for our own information and to help us with our data cleansing activities, rather than to suggest that one should be completed in every case."

10. Mr Jolliffe sent another e-mail to the PPF, on 29 March 2006, in which he said,

"I do not intend to do a Section 179 valuation for this Fund at 31 March 2006, even for my own information. The next actuarial valuation is due on 5 April 2006, and I expect to do this shortly after the valuation date.

This Fund is insured with Zurich (Eagle Star) in a with profits policy, in which members' pensions are largely fully secured."

11. The Board issued the 2006 Determination on 30 March 2006.
12. In December 2006, the Scheme received invoice number 10011900-000-07-01 for £10,907.73. The risk-based levy was based on an under-funding risk of £3,884,680.71, based on estimated assets of £4,507,755.11 and estimated liabilities of £7,992,796.02. The funding level was calculated to be 56.40%
13. On 9 May 2007, Mr Jolliffe wrote to the PPF enclosing a Section 179 Valuation Certificate. This showed that the Scheme's assets, as at 31 March 2006, were £6,435,883 and the liabilities were £5,423,590.

WRITTEN REPRESENTATIONS

14. The PPFO has received written representations from the PPF and from Mr Jolliffe. These are summarised below.

The PPF

15. In addition to the points already made by the Reconsideration Committee, the PPF submits:
- 15.1. The Board has calculated the levies in accordance with its 2006 Determination. The rules set out in the 2006 Determination are applied to all eligible schemes and neither the Board nor the Ombudsman has the power to depart from their application on appeal from an individual scheme.
- 15.2. The Scheme is an eligible scheme in respect of which levies are payable to the PPF.
- 15.3. The Applicant's complaint is that it is unfair of the Board not to allow the Scheme to submit certain information after the relevant deadline. The Board's position is that the deadlines set by the 2006 Determination have to be respected. The 2006 Determination allows for late information to be taken into account in certain defined circumstances, but these do not apply here.
- 15.4. The Board's statutory duty is to calculate the levies payable in respect of an eligible scheme in accordance with the Determination. Under Section 175(5) of the Pensions Act 2004, the Board is required to determine:
- (a) the factors by reference to which the pension protection levies are to be assessed,
 - (b) the time or times by reference to which those factors are to be assessed,
 - (c) the rate of the levies, and
 - (d) the time or times during the year when the levies, or any instalment, become payable.

- 15.5. Section 181(3) provides that the Board must determine the schemes in respect of which the levy is imposed, calculate the amount of the levy and notify those liable to pay of the amount of the levy and the due date.
- 15.6. The 2006 Determination is not a reviewable matter. Mr Jolliffe has expressed concern that guaranteed insured schemes were not dealt with appropriately in the 2006 Determination. For the 2006/07 levy year, asset allocation was not taken into account in the calculation of the risk-based levy, save for the methodology for rolling forward MFR valuation results, because it was thought that schemes would have insufficient time to provide the required information.
- 15.7. In the case of the Scheme, Mr Jolliffe's concerns are not borne out. He has stated that the members' pensions were "largely fully secured", which indicates that the Trustees remain liable for payment of the benefits and there remained an element of risk. This is further illustrated by the fact that the Scheme's application for a waiver of the 2006/07 levy has been unsuccessful because the requirement for all relevant benefits to be provided in full by a policy of insurance or an annuity contract has not been satisfied.
- 15.8. The 2006 Determination specifies that, where no Section 179 valuation has been supplied by the relevant deadline, the levies should be calculated using the latest MFR valuation information provided in the scheme return and rolled forward using its stated methodology. The Applicant does not suggest that, applying that approach, anything has gone wrong with the calculation of the invoice. However, the Applicant believes the Board should instead substitute the Section 179 valuation information which was supplied after the deadline.
- 15.9. The Trustees did not submit a Section 179 valuation on or before 31 March 2006.
- 15.10. Mr Jolliffe says that he did not do so because he received no reply from the Board when he asked, in an e-mail dated 13 February 2006, if he should. In fact, there was a response, dated 20 March 2006, but this was intended to leave the decision about submitting a Section 179 valuation to Mr Jolliffe's

own judgement, on the basis of publicly available information and advice, in the same way that other schemes were also required to make this judgement.

15.11. The process for calculating the risk-based levy requires, amongst other things, an assessment of the level of under-funding of the Scheme. This is assessed by means of a section 179 valuation. In the absence of a section 179 valuation, the MFR data, as set out in the most recent scheme return, is used. At the relevant time, all schemes (save those created after 31 March 2004) were required to have had a MFR valuation. However, under the Pension Protection Fund (Valuation) Regulations 2005 (as amended), eligible schemes are not required to have completed their first section 179 valuation until 31 March 2008.

15.12. The Board went to considerable lengths to ensure that trustees and employers of eligible schemes were put in a position to understand how the levy would be calculated. The consultation process exceeded the statutory requirements

15.13. From October 2005, all schemes had the opportunity to update data on their scheme return before the 31 March 2006 deadline. The following “Frequently Asked Question” (FAQ) was published on the PPF website,

“Since submitting my Scheme Return to the Pensions Regulator I have realised that some of the information included was inaccurate/not up to date. How can I provide additional information to the Board of the Pension Protection Fund and when should I do so by to ensure this information is included in the 2006/07 risk based levy calculation?”

- a. It is indeed possible to provide further valuation information on top of a scheme return already submitted. To do so please email your additional information direct to the Pension Protection Fund at ...
- b. To ensure that additional information is taken into account in the 2006/07 risk based levy calculation, it should be emailed to the Board by 31 March 2006.”

15.14. The Scheme appears on the mailing list for the February 2006 levy mailing.

15.15. The question of whether the Section 179 valuation submitted in May 2007 is valid is of no relevance because it was submitted after the deadline.

- 15.16. Two Section 179 certificates were submitted by Mr Jolliffe; one had no effective date, no signature and the certification box was unchecked and one had no signature and an unchecked certification box. Had the certificate been provided by the appropriate date, the Scheme would have been offered the opportunity to correct any errors.
- 15.17. Paragraph 8 of the Schedule to the 2006 Determination provided that a Section 179 certificate would be taken into account if it had been provided on or before 31 March 2006.
- 15.18. Having given schemes the opportunity to submit additional or updated information, the Board needed to set a deadline after which new information would not be accepted. It was decided that the fairest approach was to apply the deadline consistently.
- 15.19. It is the case that a number of schemes and employers realised too late that they might have been able to reduce their levy bill had they provided updated or additional information or taken other action. In addition to the requirements of the 2006 Determination, it has been the Board's consistent position that it would be unfair on those schemes if the Board were to allow schemes to circumvent the deadline now. It would also increase the burden on other levy payers for future years.
- 15.20. Mr Jolliffe says that the payment of what is considered to be an incorrect levy of £10,907.73 is likely to cause a reduction in the wind up benefits available to members. In general, unless a scheme is finely balanced between over- and under-funding, and given that the levy invoice is likely to be payable in any event, payment of the levy invoice is unlikely to affect the level of benefits available to members on a winding up. In any case, such considerations cannot affect the proper calculation of the levy in accordance with the 2006 Determination.
- 15.21. Mr Jolliffe's point, as to the impact of the levy on individual members of the Scheme, is not entirely valid. Although a reduction in the levy might have been secured by submitting a Section 179 valuation, some (possibly very

little) levy would still have been payable and the Scheme would have borne the cost of preparing the Section 179 valuation.

- 15.22. The question of fairness in the particular individual circumstances of a scheme is not one which the Board is permitted to take into account in calculating the levies payable in accordance with the 2006 Determination. It would be unworkable to do so for every scheme and it is one of the Board's stated aims to treat schemes consistently.
- 15.23. Mr Jolliffe claims that he was led to believe, by the exchange of e-mails in February/March 2006, that the levy would be calculated on the basis that the Scheme was in surplus. This is an untenable reading of the e-mails. Reading the e-mail exchange as a whole, it is perfectly obvious that the Board's stated intention was to use the MFR data where no Section 179 valuation was submitted by the deadline. If an individual scheme had been misled by what it had been told by the Board (which is not the case here), that might possibly give rise to a complaint of maladministration, but would not affect the Board's statutory duty to calculate the scheme's levy in accordance with the Determination.
- 15.24. With regard to the reference to Regulation 7(2)(c), the Board does not believe that it was taking advantage of any drafting error in the Pension Protection Fund (Valuation) Regulations; the Regulations are expressly drafted to relate only to Section 179 and Section 143 valuations and not to the initial levy.
- 15.25. The Board believes that it has considered and, where appropriate, exercised the discretions set out in the Schedule to the 2006 Determination.
- 15.26. Paragraph 4 of the Schedule to the 2006 Determination allowed the Board discretion to take into account information provided after the deadline in cases where it appeared that information had been despatched at an appropriate time, but was delayed in the course of post or otherwise, including temporary inaccessibility of the Board's website or an interruption of electronic communications. This does not apply here.

15.27. Paragraph 6 stated,

“Nothing in the Board’s determination or this Schedule shall prevent the Board from reviewing the amount of the levies calculated in respect of a scheme where it subsequently appears to the Board that the information upon which the calculation was based was incorrect in a material respect ...”

15.28. This did not create any discretion, but merely made it clear that the Board’s powers of review were not excluded. This was necessary because the Board has to take information supplied at face value, but needed the power to impose the correct levies if it later turned out that incorrect information had been supplied. The information supplied by the Scheme was not incorrect.

15.29. If it were to be found that paragraph 6 did allow the Board discretion to take into account the Section 179 valuation information, there are good reasons not to exercise such a discretion. The most fair and proportionate approach as between schemes is to have a data deadline and to enforce it strictly.

15.30. Paragraphs 9(b)(iii) and 11 of the Schedule to the Determination relate to situations where the Board asked for the relevant information after 31 March 2006 and the information was provided in response to that request. The purpose of these paragraphs is to enable the Board to obtain additional information in cases where it would not otherwise be able to calculate the levy. This was not the case here.

15.31. The Ombudsman may only intervene where the decision of the Reconsideration Committee was not reached correctly. This would only be the case if the Committee had misdirected itself or reached a conclusion which was not open to a reasonable decision-maker. The Committee has given proper reasons for concluding that it would not be appropriate to exercise any discretion in the Applicant’s favour.

15.32. With regard to Mr Jolliffe’s e-mail of 29 March 2006, the Board could not take into account (in assessing the Scheme’s risk-based levy) an assertion that the members’ benefits were “largely fully secured”; as opposed to applying

the process set out in the Determination for calculating the levy on the basis of specific types of information to be provided by schemes.

- 15.33. Nor was the assertion of use because the statement “largely fully secured” begs the question to what extent the benefits are not secured. It does not meet the very specific criteria set out in the Pension Protection Fund (Waiver of Pension Protection Levy and Consequential Amendments) Regulations 2007 for the waiver of levies.

Mr Jolliffe

16. Mr Jolliffe submits:

- 16.1. A large part of the case presented by the PPF rests on his supposed misinterpretation of the e-mail dated 20 March 2006 (see paragraph 9). His e-mail of 20 February 2006, asking whether a Section 179 valuation was necessary, had been framed in the context of the e-mails which had gone before. The PPF’s response of 20 March 2006, in his view, clearly stated that a valuation was not necessary. He accepts that he received a response to his e-mail. If it was intended that the decision about submitting a Section 179 valuation was left to him, this was not clear.
- 16.2. The timing of the PPF’s e-mail did not give him much time in which to complete a Section 179 valuation. Such valuations are complicated and he would not have been able to complete one because the Scheme’s accounts as at 5 April 2005 were not available at that time. He could have got a very close, if not accurate, estimate of the value of the assets at the valuation date, since they were largely held in guaranteed pensions. Had the Scheme not been in substantial surplus, he would have carried out a Section 179 valuation, but he did not wish to undertake unnecessary work at the expense of his client. The cost of a Section 179 valuation is, nevertheless, less than the difference between the 2006/07 levy and that for 2007/08.
- 16.3. He is chided by the PPF for not knowing that the asset value of guaranteed pensions secured with an insurance company would not be properly calculated

in their Determination. The value of guaranteed insured pensions are properly allowed for in Section 179 and MFR valuations. Since the Determination methodology was intended to approximate an actual Section 179 valuation, he did not for one moment consider that the Determination would be so far from the truth of the actual solvency position of the Scheme as at 5 April 2005 or 31 March 2006.

- 16.4. There were no FAQs covering the valuation of insured assets.
- 16.5. He did comply with part “b.” of the FAQ (see paragraph 15.13) by supplying the information that the assets consisted of secured insured pensions two days before 31 March 2006. He should, therefore, be allowed to amend the Determination figures when they were published in December 2006.
- 16.6. It has always been the custom amongst pension professionals to work together in the best interests of occupational pension schemes and their members. He is a sole operator and, like many, was very busy at the beginning of 2006 assisting his clients to get to grips with the mass of new legislation. All his clients are small companies, which do not have in-house pensions expertise. It was impossible for someone in his position to become totally conversant with all the minutiae of the new legislation. He has to look for assistance from colleagues in other professions, including HMRC, the Pensions Regulator and the PPF.
- 16.7. He does not accept that the PPF have no discretion. Nor does he believe that the application of an inaccurately calculated levy is fair to the Scheme members, who effectively pay more than they should, whilst members of other schemes pay less than they should.
- 16.8. The roadshows referred to by the PPF were carried out in association with the Institute of Chartered Accountants. He would not normally attend accountants’ roadshows. He did obtain some information about the PPF at some of the many seminars and conferences being held at that time. However, he was extremely busy at the time. He never received any information to the effect that guaranteed insured pensions would not be valued correctly in the

Determination. The PPF should have highlighted this problem to scheme actuaries.

- 16.9. He does not contend that the levy was not calculated in accordance with the 2006 Determination. However, if the PPF were aware that guaranteed insured pensions were inappropriately dealt with in the 2006 Determination, they should have issued a general warning to that effect. He believes that the PPF were unaware of the problem and, so, should have used their discretion when the problem came to light.
- 16.10. The PPF's point as to the fairness of allowing the Scheme to submit late information would be applicable if the Scheme received a refund of levy while other schemes in the same position did not. All schemes with guaranteed insured pensions should get a refund.
- 16.11. The Section 179 Valuation Certificate does not include an invitation to tick a "check box".
- 16.12. He accepts that the asset and liability values for the purpose of the initial levy calculations have been calculated in accordance with the method set out in the Schedule to the 2006 Determination. This did not take into account the existence of guaranteed pensions secured with an approved insurance company. This omission was not recognised by the PPF nor was there any publicity concerning this omission until it was too late to do anything about it.
- 16.13. As a result of this omission, the valuation used by the PPF in respect of the Scheme was "wholly and substantially incorrect". This has been acknowledged by the PPF by their acceptance of the Section 179 Valuation Certificate for 2007/08. This is contrary to the Regulations, which specify that the Determination would apply for the period of two years up to 2008/09. He contends that the PPF have not acted in accordance with their own regulations by calculating the 2007/08 levy by reference to a Section 179 Valuation Certificate which was received by them on 9 May 2007.

- 16.14. The MFR calculations provided a methodology by which guaranteed deferred pensions secured with an insurance company could be valued. Therefore the PPF have no excuse for failing to provide an acceptable method to determine asset values.
- 16.15. He suggests that there were communication problems, which would allow the PPF to exercise its discretion under paragraph 4.
- 16.16. The information used by the PPF to calculate the levies was incorrect because it did not take into account the fact that the bulk of the assets consisted of guaranteed secured pensions.
- 16.17. The Trustees intend to wind up the Scheme with effect from 1 July 2008. The members' benefits will be secured under individual policies which will provide the member's full entitlement. It is anticipated that any surplus funds will be used for the benefit of the members. Payment of an "excessive" levy to the PPF will affect members' interests.

CONCLUSIONS

17. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004.
18. The reviewable matter in question is the amount of the risk-based levy required of the Scheme in the financial year 2006/07.
19. Under Section 175(5) of the Pensions Act 2004, the Board were required to determine the factors by reference to which the 2006/07 levies were assessed; those factors were set out in the Board's 2006 Determination. The PPF has correctly submitted that the Determination, itself, is not a reviewable matter nor is the Board able to amend the Determination on an individual application for review or reconsideration.
20. The 2006 Determination provided for the Board to calculate the levies by reference to a scheme's MFR data, as submitted on the most recent scheme return, where a Section 179 valuation had not been submitted. The 2006 Determination provided for the MFR data to be adjusted in order to produce an equivalent to a Section 179

valuation and then “rolled forward” to March 2006. The formulae for adjusting the MFR data were contained in Appendix 2 to the 2006 Determination (Part 4).

21. The PPF submit that, in the circumstances, the Board had no discretion to accept the information after the March 2006 deadline. I agree that paragraph 4 of the 2006 Determination is of no assistance to the Scheme, since it specifically provided for information to be accepted after the deadline where an attempt to submit it on time had been thwarted by communication problems outside a scheme’s control, for example, the PPF website being temporarily inaccessible.
22. Paragraph 6 is, I believe, more flexible than the PPF suggest. However, I do accept (with reluctance) that it would apply only where the information used in the calculation of the levies was “incorrect”, as opposed to incomplete. The Board calculated the levies by reference to the information given on the 2005 scheme return. That there was additional information, which could have been included in the return, but was not, does not mean that the Board have used “incorrect” information for the purposes of calculating the levies.
23. Paragraph 11 applies where the Board has requested additional information and is, therefore, of no assistance to the Scheme. It specifically provided that there should be no obligation for the Board to seek further information where that information had not been provided.
24. The fact remains that the Scheme did not submit a Section 179 valuation and the Board, therefore, used the most recent MFR valuation; as it had said (on more than one occasion) that it would. Mr Jolliffe appeared to be proceeding on the basis that the PPF would tell him if it wanted a Section 179 valuation, but in fact schemes had been given the option to provide a Section 179 valuation: the decision was for the Trustees to make. The PPF were not there to advise Mr Jolliffe as to the merits or otherwise of submitting a Section 179 valuation.
25. Mr Jolliffe’s e-mail of 29 March 2006 stating that the members’ benefits were “largely fully secured” was not the same as submitting a Section 179 valuation and was not sufficient for the Board to do other than refer back to the most recent MFR valuation.

26. I find that the Board has calculated the risk-based levy in accordance with the provisions of the 2006 Determination and is, therefore, not required to take any action.
27. Whether the 2006 Determination should have made alternative provisions for schemes with guaranteed pensions secured by insurance policies is outside the scope of my review. As is the calculation of the 2007/08 levy; unless Mr Joliffe wishes to ask for that to be reviewed by the PPF in the first instance.

CHARLIE GORDON
Deputy Pension Protection Fund Ombudsman

19 August 2008

APPENDIX 1

The Pensions Act 2004

“175 Pension protection levies

- (1) For each financial year falling after the initial period, the Board must impose both of the following –
 - (a) a risk-based pension protection levy in respect of all eligible schemes;
 - (b) a scheme-based pension protection levy in respect of all schemes.

...
- (2) For the purposes of this section –
 - (a) a risk-based levy is a levy assessed by reference to –
 - (i) the difference between the value of the scheme’s assets (disregarding any assets representing the value of any rights in respect of money purchase benefits under the scheme rules) and the amount of its protected liabilities,
 - (ii) except in relation to any prescribed scheme or scheme of a prescribed description, the likelihood of an insolvency event occurring in relation to the employer in relation to the scheme, and
 - (iii) if the Board considers it appropriate, one or more other risk factors mentioned in subsection (3) ...

...
- (5) The Board must, before the beginning of each financial year, determine in respect of that year -
 - (a) the factors by reference to which the pension protection fund levies are to be assessed,

- (b) the time or times by reference to which those factors are to be assessed,
- (c) the rate of the levies, and
- (d) the time or times during the year when the levies, or any instalment of levy, becomes payable.

...”

“181 Calculation, collection and recovery of levies

...

- (3) The Board must in respect of the levy -
 - (a) determine the schemes in respect of which it is imposed,
 - (b) calculate the amount of the levy in respect of each of those schemes, and
 - (c) notify any person liable to pay the levy ...

...

- (8) Regulations may make provision relating to –
 - (a) the collection and recovery of amounts payable by way of any levy ...
 - (b) the circumstances in which any such amount may be waived.”

“Schedule 9

Reviewable Matters

...

- 19 The amount of the initial levy or any pension protection levy payable in respect of an eligible scheme determined by the Board under section 181(3)(b).”

APPENDIX 2

Determination under Section 175(5) of the Pensions Act 2004 in respect of the financial year 1 April 2006 – 31 March 2007

1. The Determination dated 30 March 2006 provided:

“2. Save where otherwise stated, all matters referred to in this Schedule shall be assessed, measured or quantified in accordance with the factual position as it existed at 31 March 2006.”

“4. Where this Schedule refers to certain information having been provided to the Board ... on or before a certain date, the information shall be treated as having been so provided if but only if the Board is satisfied that it has been received at the Board’s offices ... on or before the date in question ...

... Save where this Schedule specifically provides otherwise, the deadline for any information provided to the Board otherwise than pursuant to a specific request or requirement is 31 March 2006. The Board may at its discretion take account of information provided after the applicable deadline, but before the issue of notification of the amount of the levies in respect of the scheme concerned, in cases where it appears that information was despatched at an appropriate time but was delayed ...”

“5. It is intended that the provisions contained in this Schedule should in all cases permit the calculation of the amount of the levies in respect of a scheme. However, in the event that any situation arises for which the Schedule fails to make the provision required for a calculation to be performed, the Board hereby determines that the calculation of the levies shall be performed in such manner as, in the opinion of the Board, is reasonably practicable and best gives effect in that situation to the general approach laid down by this Schedule. This paragraph shall also apply in any case where the Board is unable to obtain some item of information which would normally be required for the application of this Schedule in accordance with its terms.”

“6. Nothing in the Board’s determination or this Schedule shall prevent the Board from reviewing the amount of the levies calculated in respect of a scheme where it subsequently appears to the Board that the information upon which the calculation was based was incorrect in a material respect, or that a notification required by or under a certificate in relation to contingent assets has not been duly given, or that a certificate or declaration given for the purposes of this Schedule was improperly given or

contained information which was incorrect in a material respect. Further, in calculating the levies in respect of a scheme the Board may disregard any such certificate or declaration if the Board believes that it has been improperly given, and may similarly disregard any information in the certificate or declaration, or in any notification or return, which is believed to be incorrect.”

“9. References in this Schedule to the value or amount of the assets or the protected liabilities of a scheme shall be understood as follows but subject to paragraph 22 below:

(a) ...

(b) Where there is no section 179 valuation, the reference is to the value or amount of the assets or liabilities of the scheme shown in the [MFR] valuation data supplied with the scheme’s most recent scheme return made in accordance with section 63-65 of the Pensions Act 2004, but adjusted in a manner which in the view of the Board gives effect to the approach set out in Appendix 2 to this Schedule and results in the scheme’s assets and its liabilities being consistently treated for these purposes. For this purpose the Board will take account of –

- i. Scheme returns which are made on or before 31 March 2006; and
- ii. Scheme returns which are made after that date but during the financial year 1 April 2006 to 31 March 2007, in cases where the return was made as part of the first scheme return process in respect of that scheme initiated since 6th April 2005. In such a case the Board will where necessary issue a revised notification of the amount of the levies in respect of the scheme.
- iii. Information which supplements or corrects information contained in a scheme return falling within sub-paragraph i or ii above, where such information is provided to the Board on or before 31 March 2006, or where it is provided after that date but in response to a request or requirement of the Board or of the Pensions Regulator, and is received prior to the calculation of the levies on relation to the scheme concerned. Such information shall be treated as forming part of the scheme return in question.”

“11. The Board may, at any time prior to the calculation or any recalculation of the levy in respect of a scheme, take such steps as it thinks fit to obtain further or amended information for the purposes of that calculation or recalculation. But the Board is under no obligation to take such steps where information has not been provided to the Board.”