

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

**Applicant** : Mr A Reid, on behalf of the Trustees of the Lithgows Limited Pension Scheme  
**Scheme** : The Lithgows Limited Pension Scheme

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 15 October 2008.

**Grounds for Referral**

- The partners of Ormsary Farmers are entitled to keep their financial information private since, with the exception of HMRC, there is no requirement to make their accounts available to any other public or statutory body;
- As a result, Dun & Bradstreet (**D&B**) are relying on extremely limited information relating to payment histories to calculate the failure score for Ormsary Farmers;
- D&B advised that they would take into account any accounts submitted to them, but that these would be loaded on to their system and be available to anyone accessing that system;
- This would be contrary to the principle of privacy underlying the registration of a limited partnership and may be contrary to the Data Protection Act;
- Ormsary Farmers has always been prepared to provide financial information to the PPF, provided that the information remained confidential to the PPF;
- The PPF has the power to review the amount of the levies under paragraph 6 of the Schedule to their Determination for the year in question, but has chosen to rely on the failure score provided by D&B, based on the scant information already outlined, without seeking any other information;

- Two of the partners in Ormsary Farmers have unlimited liability and could be held personally liable for the Scheme's deficit; this has not been reflected in the calculation of the risk-based levy;
- If the unlimited liability of the partners is not to be reflected in the calculation of the risk-based levy, confirmation that the partners will not be held liable is sought from the PPF;
- Given that a limited company's liability as a participating employer is capped, it would seem equitable that the same principle should be applied to the individual partners of Ormsary Farmers;
- For the purposes of calculating the levies, they have proposed allocating orphan liabilities to the holding company, but the PPF have not accepted this;
- Several of the participating employers were incorporated after the orphan liabilities were incurred; there is no contractual arrangement or precedent under company law whereby a company can be deemed to have accepted the liabilities of another business;
- No opportunity has been provided for discussion with the PPF.

### **Background**

2. The Scheme is a multi-employer scheme. Lithgow Limited is the principal employer.
3. Ormsary Farmers is a participating employer, but is not part of Lithgows Limited. It is registered in Scotland, under the Limited Partnerships Act 1907, as a limited partnership. It is not required to publish its accounts.
4. There are nine former participating employers with 433 deferred or pensioner members still in the Scheme. Of those employers: one is still owned by Lithgows Limited and has two deferred members in the Scheme; one still exists, but under a different ownership; and the remainder have either been closed down or liquidated. Lithgows Limited owned all nine former participating employers at some time, but there was no other connection between the employers or between these employers and the current participating employers.

5. There is a Frequently Asked Question (FAQ) on the PPF website, which explains,

**“When completing the annual Scheme Return issued by the Pensions Regulator in respect of a multi-employer scheme, how should I apportion orphan members, and members who cannot be assigned, to the remaining participating employers?”**

Orphan members and members who cannot be assigned to the current participating employers, for whatever reason, should be allocated between the remaining participating employers of the scheme in proportion to the number of non-orphan scheme members belonging to each participating employer.

For example, assume a scheme has 120 members in total and 60 of these cannot be apportioned. There are 3 remaining participating employers with the following number of members:

Employer A - 10 members

Employer B - 20 members

Employer C - 30 members

The remaining 60 members should then be allocated in the same proportions i.e. 10 members to Employer A, 20 members to Employer B and 30 members to Employer C giving the following totals to be entered on the Participating Employers form:

Employer A - 20 members

Employer B - 40 members

Employer C - 60 members”

### **Reconsideration Committee’s decision**

6. The Reconsideration Committee’s decision is summarised as follows:

- The Applicant had requested a reconsideration in respect of the Scheme levies for the period 1 April 2007 to 31 March 2008, as set out in an invoice dated 9 November 2007;
- This was a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004;
- The Board had consulted on the risk-based levy over the period from September 2006 to March 2007;

- Under Section 175(5) (of the Pensions Act 2004), the Board was required to determine the factors by reference to which the levies would be calculated, the time at which the factors were to be assessed, the rate of the levies and the time at which they became payable;
- The Board published its determination of these matters (the **PPF Determination**) on 1 March 2007;
- Reconsideration of the amount of the Scheme's levies was a reconsideration of the amount of the levies in a particular case and not a reconsideration of the PPF Determination;
- Neither the Committee nor the Board had any discretion to depart from the PPF Determination;
- The risk-based levy was calculated by reference to the formula  $U \times P \times R \times c$  and subject to a cap (K) equal to 0.0125 multiplied by the Scheme's protected liabilities;

*Specific Issues*

- Ormsary Farmers' D&B Score
  - The Applicant took issue with the way D&B assessed the failure score for Ormsary Farmers;
  - Paragraph 32 of the Schedule to the PPF Determination provided that, except for certain express scenarios, the failure score to be provided by D&B should be that which was or would have been assigned to the relevant employer in the ordinary course of its business;
  - Neither D&B nor the Board were entitled to depart from that approach;
  - The Board's duty was to calculate the levy taking into account the failure score provided by D&B;
  - The Board had provided a route for schemes to appeal to D&B and the Scheme had made use of the appeal mechanism;
  - D&B had confirmed that the failure score was correct;

- A FAQ on the PPF website had explained that D&B was happy to receive signed, audited accounts where there was no requirement for an employer to publish its accounts.
- Allocation of orphan liabilities
  - Under the Pensions Act 1995, all scheme employers are liable for a share of any deficit in funding in respect of orphan liabilities;
  - Regulations provide that, unless the scheme had an apportionment arrangement or a withdrawal arrangement under the terms of the Occupational Pension Schemes (Employer Debt) Regulations 2005 (the **Debt Regulations**), all employers would be liable for a share of the deficit in proportion to their share of liabilities in the scheme;
  - In order to be taken into account for the 2007/08 levies, any such arrangement had to be in place at the time of the scheme return;
  - The provisions of the Debt Regulations applied irrespective of company law;
  - By becoming an employer in relation to the Scheme, the companies in question had become subject to the liabilities imposed on them by the Scheme's governing documentation and pensions legislation;
  - The scheme return explained how orphan members should be apportioned and the Scheme's advisers completed the form in accordance with this guidance, as confirmed by the Applicant;
  - Trustees and employers may formally enter into arrangements to rebut the statutory apportionment of liabilities. However, no evidence had been provided that such arrangements had been entered into by the Scheme at or before 5 p.m. on 30 March 2007 or at the time the trustees' advisers completed the scheme return.
- Discretions

#### Paragraph 6

This stated that nothing in the PPF Determination should prevent the Board from reviewing the amount of the levies where it subsequently appeared to the Board that

the information upon which the calculation was based was incorrect in a material sense. The Applicant had submitted that the D&B failure score was incorrect, but D&B had confirmed that it was not. The Applicant had submitted that the allocation of orphan members should be corrected. However, the scheme return had been completed in accordance with the relevant guidance and in accordance with the statutory apportionment under the Debt Regulations. Paragraph 6 was neither relevant nor exercisable.

Paragraph 12

There was provision for the Board to take steps to obtain further or amended information for the purposes of calculating the levies. However, it was under no obligation to do so where information has not been provided on or before the applicable deadline.

Paragraph 13

Where information necessary for the calculation of the levies had not been provided in the manner or format or by the time anticipated by the PPF Determination, the Board could use equivalent information provided in another manner or at another time. However, it was not under any obligation to do so. In this case, the Board had the necessary information in order to be able to calculate the levies.

- The Committee upheld the original calculation of the levies.

**Written representation from the PPF**

7. In addition to the points made by the Reconsideration Committee, the PPF submits:
  - The D&B failure score does not form part of the reviewable matter and is outside the scope of the referral;
  - The Applicant appears to be saying either that D&B should base the failure score on information which is not available to them or that Ormsary Farmers is not prepared to provide financial information to D&B because it would become publically available;

- The Board is not able to require employers to provide information to D&B which might assist in improving the failure score; it is for the individual employer to choose whether to do so;
- The Applicant submits that the assessment of the failure score should take into account the unlimited liability of the partners, but this would be meaningless in the absence of any confirmation as to the assets those partners might be able to make available to satisfy any liability;
- The Applicant submits that there was no opportunity to discuss his concerns with the Board. The review and reconsideration processes are generally paper processes and the Board is not aware of any request for a discussion. It does provide a designated Stakeholder Support Team to deal with queries;
- The Employer Debt Regulations do refer to apportioning orphan liabilities by reference to liability attributable to employment with an employer, but they have endeavoured to find a practical solution because it is not possible to categorically assign orphan employees to an employer.

#### **Further submissions from the Applicant**

8. The Applicant further submits:
  - He is concerned that there has been no discussion, either by telephone or in a meeting, with the PPF or the Ombudsman;
  - The Ormsary Farmers' partners are entitled to protection under Article 8 of the European Convention on Human Rights (the right to respect for private and family life); this covers their financial accounts.

#### **Conclusions**

9. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004.
10. The reviewable matter in question is the amount of the risk-based levy required of the Scheme for the financial year 2007/08.

11. Under Section 175(5) of the Pensions Act 2004, the Board was required to determine the factors by reference to which the 2007/08 levies were assessed; those factors were set out in the PPF 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.
12. The PPF Determination provided for the risk-based levy to be calculated using the failure score calculated by D&B in the ordinary course of its business (paragraph 32). Where, for whatever reason, employers do not submit accounts to Companies House (D&B's usual source of information), D&B will accept accounts submitted directly to them. Ormsary Farmers have decided not to do this because they do not wish their accounts to be stored on D&B's system. That is entirely their choice. However, in making that decision, they have to accept that the information that is available to D&B, in calculating the failure score, is limited and that may not be to their advantage. They must weigh this against their reluctance to disclose their accounts and decide which is most important to them. There was no requirement within the PPF Determination for the Board to make additional provision for employers faced with this dilemma. Whether the Board should have made provision for this in drafting the PPF Determination goes beyond the reviewable matter.
13. Ormsary Farmers were prepared to disclose their accounts to the PPF. However, this did not comply with the terms of the PPF Determination, which required the Board to use the failure score calculated by D&B. There was no provision for the PPF to accept an employer's accounts and calculate a failure score themselves. The Applicant has suggested that paragraph 6 would allow the PPF to review the levy. Paragraph 6 would allow the PPF to review a levy where the information used to calculate that levy was found to be incorrect in a material respect. The fact that there is additional information available, which has not been used in calculating the employer's failure score, does not mean that the information used to calculate the levy is incorrect in a material respect. Nor does the power to review in paragraph 6 override the requirement to use the failure score calculated by D&B.
14. There are some circumstances in which I would consider taking oral evidence, but in this case I cannot see that there is anything the Applicant could say that could not be



said in writing. It may be that he has in mind giving evidence as to Ormsary farmers' financial position – but I could not take that into account in my consideration of the PPF decision.

15. The Applicant has suggested that there has been some breach of Article 8 of the European Convention on Human Rights. Briefly, this provides that there should be no interference by a public authority in the individual's right to respect for his private and family life, his home and his correspondence; except in accordance with the law and necessary for (amongst other things) the economic well-being of the country.
16. Strictly there has been no such interference, because the partners in Ormsary Farmers have not been *required* to divulge information. They have a choice. It is just that if they do not do so, on their account, there are adverse financial consequences in the form of a higher levy than would otherwise be calculated.
17. This goes somewhat beyond the reviewable matter before me, but in any event it does not seem to me to be very different from the broader commercial decision that Ormsary Farmers have taken in deciding, for other purposes – and perhaps by default, not to supply information to D&B. Those with whom they have dealings generally would, if they use D&B, have to make decisions largely in the dark and on Ormsary Farmers account more information would give a better financial picture. (Of course I do not know whether there are any such dealings and whether other parties could be satisfied in some other way, but the principle is there even if the PPF levy is the first time it has had practical consequences.)
18. The Applicant also disagrees with the way orphan liabilities have been dealt with. Paragraph 35 of the PPF Determination provided that the number of members deemed to be employed by any employer was to be determined by reference to the relevant scheme return (which the Trustees are required, by law, to complete). The scheme return requires any members which have not already been allocated between participating employers to be allocated in proportion to the number of members already allocated. This is the way employers were instructed to allocate orphan liabilities in the FAQ. It is not the same the way that the Debt Regulations approach the issue. However, since paragraph 35 refers to the scheme return and the scheme return required the orphan liabilities to be apportioned by reference to the number of

employees for each employer, the PPF were correct in taking this approach with the Scheme. Whether the PPF should have taken an alternative approach, for example, allowing the allocation of orphan liabilities to a single company, goes beyond the reviewable matter before me.

19. I find that the Board has calculated the risk-based levy in accordance with the provisions of the PPF Determination and is not required to take any action.

**TONY KING**  
Pension Protection Fund Ombudsman

25 September 2009