

**PENSIONS ACT 2004, PART 2 CHAPTER 6**

**APPEAL TO PENSION PROTECTION FUND OMBUDSMAN**

**DETERMINATION BY THE DEPUTY PENSION PROTECTION FUND OMBUDSMAN**

**Applicant** : The Trustees of the G C Bateman Group of Companies Pension and Life Assurance Scheme (the **Trustees**)  
**Scheme** : The G C Bateman Group of Companies Pension and Life Assurance Scheme

1. The Pension Protection Fund Ombudsman has received a reference of a reviewable matter, following a decision by the Reconsideration Committee of the PPF dated 6 March 2007.

**RECONSIDERATION DECISION**

2. The Reconsideration Committee decided:
  - 2.1. The reviewable matter to which the Applicant's request for reconsideration related was 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.
  - 2.2. This calculation was a reviewable matter by virtue of paragraph 19 of Schedule 9 of the Pensions Act 2004.
  - 2.3. The Applicant had requested a review on the basis that:

“the levy imposed is unfair. The reason [they] feel this to be the case, is that notification of the requirement in respect of further scheme information on multi employer schemes (Declaration of Scheme Structure form, Participating Employers form, Type A Contingent Assets certificate) were not communicated to [their] scheme successfully. Due to this failure in communication and subsequent lack of action on the part of the Scheme, it is being penalised by a potentially over inflated Levy.”
  - 2.4. Certain matters were not in dispute. These were:
    - The Scheme is a multi-employer scheme.

- The most recent scheme return, dated 1 December 2005, confirmed that there were five employers in relation to the Scheme. These were G. C. Bateman Limited, Bateman (Opticians) Limited, M. W. Dunscombe Limited, F. A. Bateman Limited and Bateman Laboratories Limited.
- The employer with the most members, according to the scheme return, was Bateman (Opticians) Limited.
- The Trustees did not submit a Declaration of Scheme Structure form or a Participating Employers form on or before 31 March 2006.
- These forms were annexed to the Board's Determination of the pension protection levies for the year 1 April 2006 to 31 March 2007 (the **Determination**).
- The Trustees did not submit a certificate in respect of a recognised Type A Contingent Asset (group company guarantee) to the Board on or before 31 March 2006.

2.5. The Chronology of the Board's consultation process for the risk-based levy was as follows:

12 July 2005	Consultation paper on risk-based levy for 2006/07 issued.
4 October 2005	Consultation period closes.
14 October 2005	Consultation update published.
16 December 2005	Start of second consultation period. Draft Determination issued.
23 January 2006	Second consultation period closes.
28 February 2006	Response to second consultation published.
28 February 2006	Final form of Determination published, subject to regulations coming into force.
30 March 2006	Determination published.

- 2.6. A series of ‘roadshows’ were held in London, Manchester, Edinburgh and Belfast.
- 2.7. Under Section 175(5) of the Pensions Act 2004, before the beginning of each financial year, the Board must determine, in respect of that year:
- The factors by reference to which the pension protection levies are to be assessed;
  - The time or times by reference to which those factors are to be assessed;
  - The rate of the levies; and
  - The time(s) at which the levies become payable.
- 2.8. The Board had been advised that a review or reconsideration of the amount of a levy is a review of the calculation of the levy in a particular case and not a review of the Board’s Determination. 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.
- 2.9. The Determination sets out how the insolvency risk factor will be determined in relation to a multi-employer scheme. The Determination also sets out the formula for the calculation of the risk-based levy.
- 2.10. The derivation of factor P in that formula is set out in the Determination. This provides that P shall be the PPF assumed probability of insolvency associated with the Failure Score which applies to the employer in relation to the scheme.
- 2.11. The Determination sets out how the risk-based levy formula is applied to a multi-employer scheme.
- 2.12. The Determination provides that, where no declaration of scheme structure was made to the Board on or before 31 March 2006, the derivation of factor P shall apply as if the sole employer of the scheme was the employer with the largest number of members.

- 2.13. The employer with the largest number of members for the Scheme is Bateman (Opticians) Limited. Calculating the factor P by reference to the failure score for Bateman (Opticians) Limited is in accordance with the Determination.
- 2.14. The issue of affordability of the levy is addressed by the fact that the risk-based levy is capped at 0.5% of the Scheme's protected liabilities. However, the issue of affordability is a matter of policy which was not open to review in this forum.
- 2.15. In a letter dated 8 November 2006, the Trustees acknowledged that:
- “the PPF did attempt to publicise the changes to the possible sponsoring employer(s) assessment methods ... and more specifically through an email campaign to individuals registered at the annual scheme return. Unfortunately this information did not reach any individuals within the Scheme or Company who would have been able to act on it, due to certain individuals leaving the business at the time.”
- 2.16. In a letter dated 2 February 2007, the Trustees acknowledged that, following the Board's communication process, “subsequent lack of action on the part of the Scheme” and communication failures outside the Board's control were responsible for the levy being calculated on the basis that it was.
- 2.17. 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 Director (**Mr F**) of G C Bateman, who dealt with pension matters, was notified of his redundancy soon after the consultation process started in August 2005. Mr F was also a trustee of the Scheme and the recipient of correspondence on pension matters.
- 3.2. Mr F's departure from the Company on 31 January 2006 was not only abrupt, but came during a period of crucial importance for the purpose of the PPF levy. It meant that the remaining Directors (none of whom was a pensions expert) were not only unaware of the consultation process but, critically, had

no communication regarding the subsequent determination and the PPF roadshows.

- 3.3. Consequently, the Directors were not aware of the opportunity to submit a Declaration of Scheme Structure and so no such submission was made.
- 3.4. Had a Declaration of Scheme Structure been submitted, the inclusion of participating employers in addition to the principal employer (G C Bateman Ltd) would have resulted in the calculation of a reduced PPF levy.
- 3.5. The Board ignored the fact that submitting a Declaration of Scheme Structure would have resulted in a lower levy and merely confirmed that the levy had been calculated in accordance with the Determination.
- 3.6. This is unjust because, prima facie, the levy would have been less had the Directors been aware of the opportunity to submit a Declaration of Scheme Structure and had duly made such a submission.
- 3.7. The Company is in a turnaround situation and would be adversely affected by the higher levy based upon a false assessment of the Group's overall financial strength and profitability. Given that the Company's contribution to the Scheme is, in part, profit-related, the increased levy would, in turn, reduce the amount paid into the Scheme and adversely affect the Scheme's solvency.

## **MATERIAL FACTS**

4. The Board issued its 2006/07 Determination (the **Determination**) on 30 March 2006. The Determination stated that the failure score which would apply to an employer was to be the failure score which Dun & Bradstreet (**D&B**) informed the Board that it had assigned to that employer. The Determination stated:

“For the purposes of this Schedule, the employer or employers in relation to a scheme shall be taken to be such undertaking or undertakings as have been notified as such by or on behalf of the trustees or managers of the scheme to the Board. Any notification of participating employers to the Board for this purpose shall be provided on or before 31 March 2006 in the form attached to this Schedule [a Participating Employers form] ... Where no such notification has been provided, the employer in relation to the scheme shall be taken to be

the employer identified as the employer of the largest number of defined benefit members in the most recent scheme return ...”

5. The formula for calculating the risk-based levy was set out in the Determination, as follows:

$$U \times P \times 0.8 \times 0.53$$

Where, U is based on the relationship between the scheme’s assets and liabilities and P is the PPF assumed probability of insolvency associated with the failure score which applies to the employer in relation to the scheme.

6. The Determination provided that, where the Board had not been provided with a Declaration of Scheme Structure form, P is applied as if the sole employer in relation to the scheme was the employer of the largest number of members.
7. According to the Scheme Return completed in December 2005, there were 702 members as at 6 April 2005. Of these, 291 were active members, 177 were deferred members and 234 were pensioners.
8. The Scheme Return includes a section requiring details about scheme employers. The Principal Employer was stated to be G. C. Bateman Limited. The “employer with the most members” was stated to be Bateman (Opticians) Limited, with 450 members. The “employer with fewest members” was stated to be M. W. Dunscombe Ltd, with 42. The form asks how many other employers participate in the Scheme as well as the employers mentioned. The answer to this question was given as three. They were listed as G. C. Bateman Limited, F. A. Bateman Limited and Bateman Laboratories Ltd; all were said to be associated to the principal employer and contributing to the Scheme. The form was completed by Mr F.
9. In October 2006, the PPF issued an invoice for £130,153.85. Of this, £123,697.00 represented the risk-based levy. In the explanatory notes accompanying the invoice, the PPF explained that the employer with the most members had been take to be Bateman (Opticians) Limited and that this company had a D&B failure score of 60, giving an insolvency probability of 0.014620.

10. The Trustees wrote to the PPF on 23 October 2006:

“The main cause for my writing is in relation to the D&B Score used which has been based upon the largest subsidiary Company with the most members ... However the above Scheme is sponsored by the parent company G.C. Bateman Limited as set out in the ... Scheme Return. In addition, as was also indicated there are a number of participating employers other than the Principal Company, as detailed in the enclosed extracts from the Composite Working Deed. The subsidiary companies fall within two groups of companies, which are relevant in considering the risk of insolvency, the other being P Campion (Holdings) Limited.

...

I understand that the PPF does have the discretion to take account of multi employer schemes and it would appear that in this instance the Company Scheme falls into the category of a “non segregated scheme with neither a requirement nor a discretion to segregate on cessation of participation of an employer” or Last Man Standing scheme ...

After closely examining the Consultation Documents I note that the two-part Declaration of Scheme Structure and Participating Employers form should have been submitted prior to 31 March 2006 to allow the PPF to assess and take a view on the structure of the Scheme. Therefore I do understand that this submission is being made after the required deadline, but in this instance believe that the Scheme and in turn the Company is being penalised to a high degree for this administrative oversight on our part.

In summary the reason for this appeal is that there is potentially a large disparity of likely D&B scores between the participating employers and consideration of the largest employer only, I feel is having a considerably negative impact on the PPF levy being required of the Pension fund. Admittedly this is in part due to the correct form not being submitted in time, but I would request that this fact is viewed in relation to the need to avoid an undue burden on an underfunded scheme ...”

11. The Trustees subsequently applied for a review. In a letter dated 8 November 2006, they said:

“... the GC Bateman Group is made up of several different companies and examining one Company in isolation does not result in a fair failure score for the sponsoring employer(s).

It is understood that the PPF did attempt to publicise the changes to the possible sponsoring employer(s) assessment methods as set out in the Consultation Document of December 2005, and more specifically through an email campaign to individuals registered at the annual scheme return. Unfortunately this information did not reach any individuals within the Scheme or Company who would have been able to act on it, due to certain individuals leaving the business at the time. Consequently the necessary two part Declaration of Scheme Structure and Participating Employer form was not submitted for assessment by 31 March 2006.

The overall result is an inaccurate D&B score which is potentially penalising the Scheme and in turn the Company for the reason that a form was not submitted in a timely fashion. As the potential disparity in levy now payable could be as much as 20% of what is due, I am sure you will appreciate that any possibility in obtaining a reconsideration of this decision must be explored as fully as possible.

The Trustees and the Company are currently finalising negotiations over the funding of the Scheme which has had considerable input from the Pension Regulator, due to the extended length of time over which funding the shortfall is necessary. Both the Trustees and the Company are working hard to ensure the assets and activities of the Scheme are managed in the most effective manner possible to maximise funding. You will understand that an artificially inflated levy does little to assist both parties in working to this aim.

Therefore the intention of this appeal is to request that consideration is given to all the employers within the GC Bateman Group responsible for sponsoring the Scheme, to ensure that a fair and accurate D&B failure score and Insolvency probability is used in the calculation of the Levy payable.”

12. The decision of the Board and the Reconsideration Committee was to find that the risk based levy had been calculated correctly, i.e. in line with the provisions of the March 2006 Determination.
13. The Declaration of Scheme Structure form asks for the full name of the scheme and the pension scheme registration number. It then asks the individual completing the form to indicate which, of six categories of segregated and non-segregated schemes, the scheme falls into. Further information is then required if the scheme is a segregated scheme. The Participating Employers form again asks for the full name of the scheme and its registration number and then asks if the scheme has sections or segregated parts. It asks for the number of employers for the scheme and, in respect



of each employer, the name, company registration number, address and the number of members. Of the information required by both forms, it is whether the scheme has segregated parts and which category of scheme it falls into which cannot be found on the scheme return.

## **WRITTEN REPRESENTATIONS**

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

### **The PPF**

15. The PPF submits:
- 15.1. It has calculated the pension protection levies in respect of the Scheme in accordance with the Determination under Section 175(5) of the Pensions Act 2004. The rules set out in the Determination are applied to all eligible schemes and neither it nor the Ombudsman has the power to depart from them on appeal from an individual scheme.
  - 15.2. The Scheme is an eligible scheme. The calculation of the risk-based levy depends in part on the likelihood of an insolvency event occurring in relation to the scheme employer. The Scheme is a multi-employer scheme with five employers. The Board is required to use the insolvency risk factor of the employer with the most employees unless a Declaration of Scheme Structure or Participating Employers form has been provided to the Board on or before 31 March 2006. No such form was provided by that deadline, nor before the calculation and invoicing of the levy.
  - 15.3. The Applicant is effectively claiming that it is unfair of the Board not to allow the Scheme to submit information after the deadline, even though the failure to meet the deadline is entirely due to the failure of the Trustees to familiarise themselves with the relevant requirements or to obtain appropriate advice.
  - 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, becomes payable.
- 15.5. The Determination is not a reviewable matter nor is the Board entitled to amend the Determination on an individual application for review or reconsideration.
- 15.6. The Ombudsman is in the same position as the Board.
- 15.7. The Determination must, in the interests of fairness, be applied impartially to all schemes in accordance with its terms.
- 15.8. The Board's position is that the deadlines set by the Determination have to be respected.
- 15.9. The Determination allows for late information to be taken into account in certain circumstances, but those circumstances do not apply here.
- 15.10. It was open to the Trustees to provide a Declaration of Scheme Structure or a Participating Employers form. They failed to do so. As a result, the employer in relation to the Scheme was taken to be the employer with the largest number of members. This was identified, from the scheme return, to be Bateman (Opticians) Limited.
- 15.11. There is no suggestion that the insolvency probability attributed to Bateman (Opticians) Limited was erroneous. The complaint is that this employer's probability of insolvency should not have been used at all.
- 15.12. The making of the Determination, as opposed to its application in the calculation of a particular scheme's levy, is not a reviewable matter.
- 15.13. The Board was required to base its probability of insolvency calculation on the information contained within the Scheme return, in accordance with the

Determination. The Determination required the Board to calculate the levy in the way it was calculated.

15.14. The Determination provides:

“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 in the course of the post or otherwise, or in any other case where the provider of the information was prevented from meeting the deadline by the temporary inaccessibility of the Board’s website, or the interruption of electronic communications, or other like cause, so long as the information was provided as soon as reasonably practicable thereafter.”

15.15. In this case, the relevant information was not provided before the issue of notification of the amount of the levies nor was the failure to meet the deadline for one of the reasons specified in the Determination. It would have been contrary to the Determination for the Board to proceed as the Applicant requests.

15.16. The Board went to considerable lengths to ensure that trustees and employers of eligible schemes understood how the levy would be calculated.

15.17. The possibility of schemes missing deadlines for the submission of voluntary certificates was recognised by the Board. For this reason, the importance of these deadlines was well publicised, including in consultation documents, a consultation update, roadshows and a series of e-mail alerts. The e-mails were sent to those on its distribution list. Individuals could be placed on the e-mail distribution list as a free service available through the Board’s website.

15.18. The Board had to take a strict approach to the deadline to ensure that the whole levying process was not delayed. The volume of data needed to calculate the levies for nearly 8,000 schemes is immense. If a relaxed approach to deadlines had been taken, the whole levying process would have been delayed significantly and schemes might have continued to refine data, in an attempt to reduce their levies, indefinitely. This would have created great uncertainty for all schemes, not to mention penalising schemes which had

provided data in a timely manner. It might be said that the issue could be addressed by a rigorous approach to the exercise of a discretion, but the exercise of a discretion would be, in itself, a burdensome task. There is nothing unfair or inappropriate about a well publicised deadline, which is strictly applied with limited and well defined exceptions.

- 15.19. Although the Applicant describes Mr F's departure as "abrupt", it appears that it was expected some five months in advance. There was ample opportunity to make arrangements for the handover of responsibility for administrative tasks relating to the Scheme. Even after Mr F's departure, there were another two months before the deadline was reached.
- 15.20. All the Trustees have a responsibility for these matters and it is not possible for the other Trustees to absolve themselves of responsibility by delegating to one of their number. If they considered that they had insufficient knowledge or experience, they could have consulted professional advisers.
- 15.21. The Board is of the opinion that there was ample time, between Mr F's departure and the deadline, for the remaining Trustees to ascertain what tasks were outstanding in relation to the Scheme and to seek professional advice.
- 15.22. The Board anticipated that there would be a wide variation in the attention applied by trustees and the quantity and quality of professional advice, and that some schemes would be 'caught out' in the first year in the way the Scheme appears to have been. It decided that the only fair and consistent way to address this was to publicise its requirements and apply the deadline consistently. It went a long way beyond what it had been required by Parliament to do by way of consultation. The Determination is not drafted so as to make allowances for the failure of particular individuals (usually as a result of poor scheme administration) to receive communications.
- 15.23. In the circumstances, the Board can see no reason why a discretion should be exercised in the Scheme's favour, even if such a discretion existed. Giving the Scheme additional time to complete a voluntary form would be in contravention of the Board's stated principle of fairness and would give the Scheme an advantage over other eligible schemes.

- 15.24. If the Ombudsman were to conclude that the Board did have the discretion to take account of late information in this case, the question would arise as to how he should approach the referral. By virtue of Regulation 16 of the Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005, the Ombudsman may only intervene where the decision of the Reconsideration Committee “was not reached correctly”. In the context of the exercise of a discretion, a decision will only have been not reached correctly if the Committee has misdirected itself or reached a decision not open to a reasonable decision-maker. Even if the Ombudsman were to disagree with the decision, this would not mean that the decision had not been reached correctly.
- 15.25. The purpose of paragraph 6 of the PPF Determination (see Appendix 2) is merely to preserve the Board’s powers of review; it does not, in itself, create a discretion. The purpose of the Determination was to set down the rules for calculating the levies on the basis of the information held by the Board on 31 March 2006 (subject to certain exceptions). It was necessary, however, to ensure that a scheme could not submit incorrect information and then argue that the Board was bound by the levy calculated on the basis of that information.
- 15.26. It is only appropriate to review a calculation if something has gone wrong with that calculation in the first place. If there was no discretion within the Determination, itself, for the Board to take account of late information in these circumstances, then, by definition, nothing went wrong with the calculation when the Board did not do so. Whilst the powers of review may be preserved, unless the determination contains a free-standing discretion to take account of the late information (which it does not), there is no just basis for seeking a review here.
- 15.27. Paragraph 6 can only apply “where it subsequently appears to the Board that the information upon which the calculation was based was incorrect in a material respect”. Paragraph 6 cannot be engaged unless it is possible to point to some piece of incorrect information which has “infected” the levy calculation.

- 15.28. Paragraph 6 also applies where required notifications have not been duly given, or certificates and declarations have been improperly given or have contained incorrect information. The wording used gives a strong indication of the type of situation to which paragraph 6 applies.
- 15.29. Submission of a Declaration of Scheme Structure or a Participating Employers form is a voluntary act. The Determination provides for two methods of calculating the insolvency risk factor: one applies if a Scheme Structure form has been submitted and the other if no form has been submitted. It is “correct” to use whichever method is applicable. The fact that no Scheme Structure form had been submitted, by 31 March 2006, does not mean that the calculation has been based upon incorrect information. That would only be the position if the Board had been given the wrong information about which employer had the most members or a Scheme Structure form had been submitted, but contained an error.
- 15.30. In this case, the information used by the Board was not incorrect and the Applicant has not suggested that it was. Rather, the Applicant failed to provide information, which might have affected the calculation, but which the Determination did not require to be provided. The calculation was correctly performed on the basis of the facts which the Determination required to be used where that information was not provided. There is no evidence to suggest that the data used in the calculation was incorrect. Therefore paragraph 6 could not apply.
- 15.31. The Board intends paragraph 6 for situations where there has been a computation or recording error. The Board has adopted a policy of only accepting corrections if the party supplying the correction signs a declaration that “the information in question serves to correct data previously provided to the Board (or the Pensions Regulator on the Board’s behalf) within any relevant deadline in the belief that it was correct, but it was in fact incorrect at the time it was provided”. The Applicant could not, in the circumstances, make such a declaration because the information provided in the scheme return was correct.

- 15.32. Paragraph 4 provides for the fact that the 31 March 2006 deadline was missed to be overlooked in certain specific circumstances. To treat paragraph 6 as containing a general discretion, to accept late information in circumstances extending beyond those set out in paragraph 4, would render paragraph 4 redundant. It cannot be right that a general discretion (under paragraph 6) may be properly exercised in such a way as to subvert the express limitations that have been placed upon the discretion dealing with specific subject matter (paragraph 4). This is contrary to the normal principles of public law.
- 15.33. The Board needs to be able to calculate the levy on the basis of the minimum amount of information which could be guaranteed to be available. The principal source of the information was the scheme return completed for the Pensions Regulator, but this did not include information about scheme structure. The Board decided that the fairest way to collect this information was by way of separate voluntary forms and only to take this information into account if provided on these forms.
- 15.34. Scheme structure information is crucially important in determining the circumstances when the PPF might have to take responsibility for the scheme, or a part of it and hence the risk it poses to the Board. It is by no means the only data item which has the potential on its own to have a significant impact on the levy amount.
- 15.35. Regulation 4(2)(c) of the Occupational Pension Schemes (Pension Protection Levies) (Transitional Period and Modification for Multi-employer Schemes) Regulations 2006 also provides for the 31 March 2006 as a rigorous deadline. It is only in a case where the Board has, by 31 March 2006, sufficient information to assess the likelihood of an insolvency event occurring in relation to all employers that the Regulations allow for the insolvency risk to be assessed otherwise than in relation the employer with the most members.
- 15.36. Whilst the Board knew, by 31 March 2006, who the employers were in relation to the Scheme, and could have obtained failure scores for each one, it did not know the Scheme structure. This is material to the likelihood of an insolvency event occurring in relation to all the employers.

- 15.37. The structure of a scheme will clearly have an impact on the likelihood of the Board having to assume responsibility for part or all of the scheme. For example, a ‘last man standing’ scheme requires all the employers to have an insolvency event before the assessment period can begin, whilst other schemes may only require an insolvency event for one employer.
- 15.38. Whether or not the Regulations strictly permitted the Board to take any approach other than to base insolvency risk on the employer with the most members in a case where there was no declaration of scheme structure by 31 March 2006, they clearly demonstrate that use of that deadline for the submission of a declaration, and rigorous enforcement of that deadline, was entirely consistent with the statutory scheme.
- 15.39. With regard to the issue of fairness, regard should be had for the position of those multi-employer schemes, probably numbered in the hundreds if not thousands, which did not submit a Declaration of Scheme Structure by the deadline, but have accepted that the Determination means what it says and have not sought to challenge the resulting levy.
- 15.40. All schemes are clearly told that they have to comply with the relevant deadlines for the supply of information. Many do. Quite a lot do not and, as a result, they may well find that their levy is higher than it would have been if full information had been supplied at the correct time. It would be unfair to other schemes if one scheme was allowed to reduce its levy by reference to late information, unless all schemes were permitted to do so or there was some very good reason why the information was late. If all schemes were permitted to submit information late, the deadline would become meaningless. There is no purpose to having a deadline unless it is enforced and enforcement is even-handed.
- 15.41. The amount of levy collections affects subsequent levy estimates and, therefore, subsequent levies paid by every scheme. Under section 177(1) of the Pensions Act, the Board must estimate the amount that will be raised by the levies it proposes to impose. This process involves long term risk modelling and careful analysis of the liabilities the Board expects to have in



the future. Meeting those liabilities involves consideration of the money already held by the Board and, therefore, sums collected from previous levy years. If collections in one levy year fall below the levy estimate, then it is likely that the estimate will have to be raised in subsequent years and the determination for those years drafted to provide for increased levies. In short, any levies not collected in one year may have to be collected in subsequent levy years.

## CONCLUSIONS

16. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 of the Pensions Act 2004.
17. The reviewable matter in question is the amount of the risk-based levy required of the Scheme in the financial year 2006/07 as calculated by the Board under Section 181(3)(b) of the Pensions Act 2004.
18. Pursuant to Section 175(5) of the Pensions Act 2004, the Board issued its Determination for the 2006/07 financial year. The Determination provided for matters to be assessed, measured or quantified in accordance with the factual position as it existed at 31 March 2006.
19. As a multi-employer scheme, the Scheme falls to be considered in the light of the Occupational Pension Schemes (Pension Protection Levies) (Transitional Period and Modification for Multi-employer Schemes) Regulations 2006 (the **Multi-employer Regulations**). The Multi-employer Regulations modify Section 175 of the Pensions Act 2004 so that, for a scheme such as the Scheme, the likelihood of an insolvency event may be assessed in relation to each employer in relation to a scheme, where the Board have received sufficient information to make such an assessment **on or before 31 March 2006**.
20. The Board took steps to ensure that it received such information by providing for multi-employer schemes to submit a Declaration of Scheme Structure and/or a Participating Employers form. It required the submission of these forms on or before 31 March 2006. It is accepted that the Trustees did not submit these forms prior to 31 March 2006.

21. Whereas the majority of the information required by the Declaration of Scheme Structure and/or a Participating Employers form, can also be found on the scheme return, the crucial information, i.e. the Scheme's structure, cannot. Without the Declaration of Scheme Structure and/or a Participating Employers form, it was not possible for the Board to know that the Scheme was a "Last Man Standing" scheme.
22. Paragraph 6 of the Determination provides that
- "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 ..."
23. The PPF have argued that it has no discretion beyond that set out in paragraph 4 of the Determination and quoted at paragraph 15.14 above. However, it is clear that paragraph 6 of the Determination gives the Board an over-arching discretion in appropriate cases to review the amount of the levy. The opening words of the paragraph clearly suggest that the fact that there is a separate discretion set out in paragraph 4 of the Determination as regards the supply of late information does not prevent the consideration of that over-arching discretion. The fact that the specific circumstances of paragraph 4 could otherwise be incorporated within a more general discretion in paragraph 6 does not, to my mind, serve to limit the effect of paragraph 6. It is not unusual to see clauses containing specific discretions sitting alongside a general discretion (a catch-all).
24. The PPF have argued that a general discretion in paragraph 6 would "subvert" the express provisions of paragraph 4. Paragraph 4 refers to specific circumstances in which the Board will accept late information. There is no reason why these should be "subverted" by a general discretion in paragraph 6. Rather, paragraph 6 provides a catch all, allowing the PPF to review the levy in circumstances not envisaged in paragraph 4; thereby extending their discretion. Without needing to define particular circumstances, it does not seem to me impossible that 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. Any alternative leaves no room for the unforeseen.

25. The PPF have suggested that the purpose of paragraph 6 was to preserve a power to review, rather than bestow a discretion. Whether this is a power to review or the discretion to review, there is a facility for the Board to review the amount of the levies calculated in respect of a scheme.
26. Prior to my investigation, the evidence did not suggest that the Board had considered when the power/discretion in paragraph 6 should be exercised and whether it might be appropriate to exercise it here. The PPF have since provided a number of reasons why the Board should not exercise a discretion under paragraph 6 to admit late information from the Scheme; some I find more compelling than others.
27. It is the case that all of the Trustees were responsible for the good management of the Scheme; not just Mr F. There was time, between Mr F leaving and the PPF's deadline, for the submission of the Declaration of Scheme Structure and/or a Participating Employers form. The deadline for submission was well publicised at the time. It is unfortunate that the Trustees did not take steps to ascertain whether there were any outstanding tasks at the date Mr F left.
28. I am less persuaded by the argument that to allow the Trustees to submit this information late would give them an advantage over other schemes. To argue that the following year's levy might be affected, if the Trustees were allowed to provide the Board with Scheme Structure information at this stage, is really an argument for allowing other schemes to take advantage of the fact that the Trustees were "caught out" (as the PPF put it). Equally, I find the argument that this scheme should not be afforded the benefit of a review simply because other schemes have not requested one unattractive. That said, I do agree that the Board should take a consistent approach in deciding when to review the levy.
29. It is the case that the information upon which the levy calculation for the Scheme was based was not "incorrect" as far as it went. Further submission by the Trustees would have provided the Board with additional information with which to calculate the levy, but the information the Board had to hand was sufficient and within the parameters of the legislation for them to calculate a levy. This, however, would not prevent the Board from considering whether to review the levy.

30. Whilst the Board initially may not have considered the merits of exercising a discretion to allow a further submission by the Trustees after the March 2006 deadline, such consideration has subsequently been given. Had I concluded that the Reconsideration Committee had not reached its decision correctly because a discretion had been overlooked, the appropriate redress would have been to remit the decision for further consideration. In view of the further extensive consideration given to the circumstances in which Paragraph 6 might apply, it would not be appropriate for me to reach such a conclusion.

**CHARLIE GORDON**  
Deputy Pension Protection Fund Ombudsman

20 February 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) ...
- (3) The other risk factors referred to in subsection (2)(a)(iii) are factors which the Board considers indicate one or more of the following –
  - (a) the risks associated with the nature of a scheme’s investments when compared with the nature of its liabilities;
  - (b) such other matters as may be prescribed.

...

- (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).”

**The Pension Protection Fund (Risk-based Pension Protection Levy) Regulations 2006 (S.I. 2006/672)**

“2 Matters prescribed for the purposes of assessing the risk-based pension protection levy

For the purposes of section 175(2)(a)(iii) of the Pensions Act 2004 (pension protection levies – other risk factors), the prescribed matters are –

- (a) the nature of, and
- (b) any risks associated with,

any arrangements which the Board considers may reduce the risk of compensation being payable from the Pension Protection Fund in the event of an insolvency event occurring in respect of an employer in relation to the scheme.”

**The Occupational Pension Schemes (Pension Protection Levies) (Transitional Period and Modification for Multi-employer Schemes) Regulations 2006 (S.I. 2006/566)**

“4 Modification of section 175 of the Act for the financial year beginning on 1st April 2006: non-segregated schemes

- (1) This regulation applies to a non-segregated scheme for the financial year beginning on 1st April 2006.
- (2) Section 175 of the Act shall be modified so that it shall be read as if –

...

- (c) in the case of a scheme -
  - (i) to which this regulation applies; and
  - (ii) the rules of which do not contain a requirement –
    - (aa) for the trustees or managers to segregate such part of the assets as is attributable to the liabilities of the scheme to provide pensions or other benefits to or in respect of the pensionable service of some or all of the members of the

scheme by reference to an employer in relation to that scheme;

(bb) which would be triggered when such an employer ceased to participate in the scheme.

for paragraph (a) of subsection (2) there were substituted –

(a) “a risk-based pension protection 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) the likelihood of an insolvency event occurring -

(aa) where, on or before 31st March 2006, the Board has received sufficient information to assess the likelihood of an insolvency event occurring in relation to each employer in relation to the scheme and such an assessment would reduce the amount of the risk-based pension protection fund levy which would otherwise be payable, in relation to each employer in relation to that scheme; or

(bb) in all other cases, in relation to the employer who on 31st March 2006 has most members of the scheme or, where two or more employers have most members, each of those employers ...”

**The Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005  
(S.I. 2005/2024)**

31. Regulation 16 provides:

“(1) If the PPF Ombudsman determines that the decision of the Reconsideration Committee in relation to a reviewable matter referred to him was reached correctly, the PPF Ombudsman must -

(a) determine that it is not appropriate for the Board to take any action in relation to the matter; and



(b) remit the matter to the Board with any directions.

(2) If the PPF Ombudsman considers that the decision of the Reconsideration Committee in relation to a reviewable matter referred to him was not reached correctly, the PPF Ombudsman -

(a) must -

(i) determine what action, if any, the Board should take in relation to the matter; and

(ii) remit the matter to the Board with directions for the Board -

(aa) to vary the determination, direction or other decision made by the Reconsideration Committee; or

(bb) to revoke and replace the determination, direction or other decision made by the Reconsideration Committee; and

(b) may direct -

(i) that -

(aa) any determination, direction or other decision which is to be made by the Board in accordance with any determination made or direction given by him; or

(bb) any variation, revocation or substitution of the determination, direction or other decision of the Reconsideration Committee which is to be made by the Board in accordance with any determination made or direction given by him,

is to be treated as if it were made at such time (which may be at a time prior to his determination or direction) as he considers appropriate;

(ii) that any notice varied, substituted, issued or given by the Board in accordance with any

determination made or direction given by him is to be treated as if -

- (aa) it were issued or given at such time (which may be a time prior to his determination) as he considers appropriate;
- (bb) it became binding for the purposes of Part 2 of the Act (the Board of the Pension Protection Fund) at the time at which he makes his determination or gives his direction or at such later time as he considers appropriate;

(iii) the Board -

- (aa) to pay such compensation as he considers appropriate to such persons as he considers appropriate;
- (bb) to take or refrain from taking such other steps as he may specify.

...

(6) The Board has the power to do anything that the PPF Ombudsman directs under this regulation.

(7) The Board's power -

- (a) under section 191 of the Act (notices requiring provision of information); and
- (b) under regulations made under section 207(1) of the Act,

shall apply for the purposes of dealing with any matter remitted to it.

..."

## APPENDIX 2

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

32. The Determination dated 30 March 2006 provides:

“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 ...”

“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.”

“10. For the purposes of this Schedule, the employer or employers in relation to a scheme shall be taken to be such undertaking or undertakings as have been notified as such by or on behalf of the trustees or managers of the scheme to the Board. Any notification of participating employers to the Board for this purpose shall be provided on or before 31 March 2006 in the form attached to this Schedule [a Participating Employers form] ... Where no such notification has been provided, the employer in relation to the

scheme shall be taken to be the employer identified as the employer of the largest number of defined benefit members in the most recent scheme return ...”

“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.”

“25. P shall be the Pension Protection Fund assumed probability of insolvency associated with the Failure Score which applies to the employer in relation to the scheme ...”

“31. In the case of a scheme in category (c)\* ... P shall be 0.9 multiplied by the weighted average of [an assumed probability of insolvency] for each employer in relation to the scheme ...”

“33. Notwithstanding anything ... above, [determination of P] above shall in the following two cases be applied as of the sole employer in relation to the scheme was that employer who is the employer of the largest number of members of the scheme, namely  
—

(a) The case in which no Declaration has been provided to the Board; and

(b) ...”

\*Applicable to the Scheme.