

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

- Applicant** : Mr A Winning, on behalf of the Trustees of the Marston's PLC Pension & Life Assurance Scheme (the **Trustees**)
- Scheme** : Marston's PLC Pension & Life Assurance Scheme (formerly known as the Wolverhampton & Dudley Breweries PLC Pension & Life Assurance 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 3 October 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.
 - 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 levy be re-calculated on the ground that the Trustees had not been given the opportunity to provide additional information to the Board concerning the involvement with the Scheme of Wolverhampton & Dudley Breweries plc (**W&D plc**).
 - 2.4. 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.
25 January 2006	The finalised contingent asset certification, supporting guidance and standard form documentation published.
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.

2.5. A series of ‘roadshows’ were held in London, Manchester, Edinburgh and Belfast.

2.6. Under Section 175(5) of the Pensions Act 2004, before the beginning of each financial year, the PPF 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 at which the levies become payable.

2.7. The Board published its final determination of these matters for financial year 2006/07 on 30 March 2006 (the **Determination**).

2.8. The Applicant had asked for a reconsideration of the amount of the Scheme’s risk-based levy. 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 set out how the insolvency risk factor (P) would be determined in relation to a multi-employer scheme, such as the Scheme. Paragraph 14 of the Schedule to the Determination set out the formula for the risk-based levy as follows:

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

subject to a cap of 0.5% of the Scheme's protected liabilities.

- 2.10. P's derivation was set out in paragraph 25 of the Schedule (see Appendix) to the Determination, which provided that P shall be the PPF assumed probability of insolvency associated with the Failure Score which applied to the employer in relation to the Scheme.
- 2.11. Part 4 of the Schedule set out how the risk-based levy applied to a multi-employer scheme.
- 2.12. Paragraphs 10 and 33 of the Schedule to the Determination (see Appendix) provide that where a scheme is a multi-employer scheme and the Board has not received a declaration of scheme structure or participating employers form on or before 31 March 2006, the employer whose failure score is to be used in calculating the pension protection levies shall be that of the employer who is the employer of the largest number of members of the scheme.
- 2.13. The Trustees submitted neither a declaration of scheme structure nor a participating employers form on or before 31 March 2006. In these circumstances, the Determination did not permit the Board to take into account group strength or the failure score of another entity.
- 2.14. A parent company guarantee could have been taken into account in the calculation of U (the under funding risk, see above), but only if the Trustees were the beneficiaries of a Type A contingent asset in the Board's standard form and had submitted the relevant certificate on or before 31 March 2006.
- 2.15. In this case, the Trustees' advisers (Mercers) confirmed that Wolverhampton & Dudley Breweries (Trading) Limited (**W&D Trading**) was the employer with the most members (**EMM**).

- 2.16. If the Trustees had wanted the financial strength of W&D plc taken into account, they should have submitted a scheme structure and participating employers form or a contingent asset certificate on or before 31 March 2006.
- 2.17. The Applicant claimed:
- It was not clear that P would be calculated by reference to the failure score for W&D Trading. If this had been clear, the Trustees would have put in place a contingent asset.
 - They did not provide details of the EMM, on the form provided by the PPF in July 2005, because the Scheme was not considered to be a multi-employer scheme at that time.
- 2.18. The Applicant claimed that the V1 scheme return form only requested details of the Principal Employer. In fact, the V1 form requested details of the Principal Employer and participating employers. It is acknowledged that it did not ask for details of the EMM. The V1 returned by the Scheme listed W&D plc as the Principal Employer and W&D Trading as a participating employer.
- 2.19. The Applicant has not provided any explanation as to why the Scheme was not considered to be a multi-employer scheme in July 2005 nor whether the Trustees took any steps to clarify this.
- 2.20. There should have been no doubt that W&D Trading was an employer. Any uncertainty must have been with regard to the status of W&D plc. It is possible for a Principal Employer not to be an employer, as defined in the Pensions Act 2004. The Scheme must either have been a single employer scheme (with W&D Trading as the employer) or a multi-employer scheme. It was difficult to see how the Trustees, or the Scheme's Actuary, could consider that the Scheme was not a multi-employer scheme or, if they did not, think that the levy would be calculated by reference to the Failure Score for W&D plc.
- 2.21. The provisions for calculating insolvency risk in the case of multi-employer schemes were set out in the July and October 2005 consultation documents

and the Determination published on 16 December 2005. Contingent asset documentation and the two-part declaration of scheme structure and participating employers form were published on the Board's website on 25 January 2006. Information as to the allocation of 'orphan'¹ members was published on 16 December 2005.

- 2.22. The Trustees had plenty of time to establish that W&D Trading would be the EMM and that its failure score would be used for the calculation of P, and to put in place arrangements to allow W&D plc's failure score to be used.
- 2.23. All schemes were in the same position. Once the Determination was published, the Board was required to apply its provisions consistently and fairly across all schemes.
- 2.24. 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 Trustees were not given sufficient opportunity to provide additional information as to the involvement with the Scheme of **Marston's plc** (formerly W&D plc). This made it impossible for the Trustees to take any action to mitigate the effects of the Board not allowing for Marston's plc's involvement in the Scheme when calculating the levy.
- 3.2. The Scheme took part in a pilot scheme. The information requested on the V1 form at that time was materially different to that later requested from schemes which did not take part in the pilot scheme. Details of the Principal and Participating Employers were requested but not details of the EMM or whether the Scheme was a multi-employer scheme. The information that was requested, at the time, was provided and was correct.

¹ Members who are not attributable to any of the Scheme's employers because they were not employed by them. In this case, brought into the Scheme in a bulk transfer.

- 3.3. In July 2005, schemes which had taken part in the pilot scheme were provided with an additional form to provide updated information for the scheme return, if appropriate. This information could have included details of the EMM, but these were not specifically requested. The information was not provided because it was only required in relation to multi-employer schemes and the Scheme was not considered a multi-employer scheme at the time. The form did not constitute a clear request for details of the EMM nor were changes to the form or the significance of those changes highlighted.
- 3.4. The Trustees would have expected to have been specifically informed if the information they had provided had been incorrect or if the information required by the PPF had changed in any material way.
- 3.5. The documentation provided by the PPF did not make it clear on what basis a company would be an employer for the purposes of the PPF or how to assess if the Scheme was a multi-employer scheme. It did not make it clear that the position was different to that under Section 75 of the Pensions Act 1995. The Trustees were not made aware that this was an issue on which they should seek legal advice.
- 3.6. The information referred to by the Reconsideration Committee is, for the most part, consultation documentation which was subject to change and did not provide a definitive position. It did not highlight the change from the approach adopted in the pilot scheme or the need to seek advice on the alterations.
- 3.7. As soon as the PPF indicated that there was a problem with the information provided and requested details of the EMM, in August 2006, the Trustees provided the information and sought legal advice as to whether the Scheme was a multi-employer scheme.
- 3.8. Once the position was clear, they took steps to put in place contingent assets for the levy year 2007/08. However, it was, by then, too late for them to put in place any contingent assets for 2006/07. Had the necessary information been available prior to March 2006, such steps would have been taken because a

parent company guarantee (from Marston's plc) for the full buy-out debt was already in existence.

- 3.9. At no point did the PPF indicate that the information previously collected was insufficient and inappropriate for the determination of the Scheme's levy payment. In the circumstances, the PPF should not, or ought not, be allowed to depart from the position represented to the Trustees as the basis for the levy calculation.

MATERIAL FACTS

4. The Trustees submitted a Scheme Return in March 2005. The form did not ask for the EMM; this information was requested on a later form issued by the Pensions Regulator in July 2005.
5. The Board issued its 2006/07 Determination (the **2006 Determination**) on 30 March 2006. The 2006 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 2006 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 ...”

6. The formula for calculating the risk-based levy was set out in Part 3 of the Schedule to the Determination, as follows:

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

Where, U (the under funding risk) is based on the relationship between the scheme's assets and liabilities and P (the insolvency risk) is the PPF assumed probability of

insolvency associated with the failure score which applies to the employer in relation to the scheme.

7. The 2006 Determination provided that, where the Board had not been provided with a Declaration of Scheme Structure form or Participating Employers form, P would be applied as if the sole employer in relation to the scheme was the employer of the largest number of members. Both forms were annexed to the Determination.
8. The Trustees did not submit a Declaration of Scheme Structure form or a Participating Employers form on or before 31 March 2006.
9. The 2006 Determination also provided for the calculation of U to take into account certain contingent assets. The permissible contingent assets were guarantees given by associated companies, security over bank accounts, land or securities and letters of credit or bank guarantees.
10. The Trustees did not submit a certificate of contingent assets on or before 31 March 2006.
11. The Scheme's Principal Employer is Marston's plc, although it has not employed anyone since September 1996. In 1999 and 2000, the assets and liabilities of two other schemes were transferred into the Scheme. All the active members were allocated to W&D Trading. Deferred or pensioner members were allocated to Marston's plc. These members are referred to as 'orphan' members by the PPF, because they were never employed by the Scheme's participating employers. In December 2005, the PPF published details of how 'orphan' members should be treated. In a Frequently Asked Questions (**FAQ**) section on its website, the PPF explained that orphan members should be divided among a scheme's employers in proportion to the number of members already allocated.
12. Of the 2,382 members allocated to Marston's plc, 1,556 were deferred or pensioner members at the date of the transfer. The Scheme's Actuary has confirmed that, had the approach required by the PPF been taken, W&D Trading would be the Scheme's EMM. The number of members allocated to Marston's plc and W&D Trading, on this basis, are 1,227 and 3,534 respectively.

WRITTEN REPRESENTATIONS

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

The PPF

14. In addition to the points already made by the Reconsideration Committee, the PPF submits:

- 14.1. It has calculated the levies in accordance with the rules which were determined before the start of the financial year. Those rules have to be applied impartially to all schemes and neither it nor the Ombudsman has any obligation or power to depart from them.

- 14.2. The Applicant appears to be suggesting that the Board should depart from the 2006 Determination in their case. In calculating the levies in respect of a particular scheme, the Board has no power to do anything other than to apply the rules set out in the 2006 Determination.

- 14.3. The 2006 Determination is not a reviewable matter. The appropriate way to challenge the 2006 Determination was by judicial review at the appropriate time.

- 14.4. In the circumstances of this case, the effect of the legislation (Section 175 of the Pensions Act 2004, as amended by The Occupational Pension Schemes (Pension Protection Levies) (Transitional Period and Modification for Multi-employer Schemes) Regulations 2006) and the 2006 Determination, means that the Board must base P on the EMM. Accordingly, questions as to the extent to which a particular scheme or its advisers were made aware of the rules relating to the levy and what they could do to influence it are not per se relevant to the reviewable matter in question.

- 14.5. The Pensions Regulator requested details of the EMM in July 2005. The form in question stated,

“Please complete the attached employer information form for all employers associated to the scheme. In addition, please provide the

additional information below for the employer with the most members in the scheme ...”

- 14.6. The Board’s view is that this form did constitute a clear request to the Trustees for details of the EMM. The Trustees’ advisers completed and returned the form on 1 August 2005. It is not clear why the advisers would regard some of the questions on the form as clear requests for information (evidenced by their providing that information) and not others – resulting in their returning a partially completed form.
- 14.7. There should have been no doubt that W&D Trading was an employer. Any uncertainty must have been as to whether W&D plc was an employer.
- 14.8. Given that details of both W&D Trading and W&D plc appeared on the Scheme Return, the Scheme must either have been a single-employer scheme (with W&D Trading as the only employer) or a multi-employer scheme. It cannot have been thought that W&D plc was the only employer.
- 14.9. It is difficult to see why the Trustees believed that the levy would be based on the failure score for W&D plc. At no time did the Board indicate that the levy would be based on the failure score for W&D plc.
- 14.10. The final versions of the contingent asset documentation and the voluntary certificates, including the two-part declaration of scheme structure and participating employers form, were published on the Board’s website on 25 January 2006. This gave the Trustees two months to put in place arrangements which would enable the failure score for W&D plc to be taken into account in the levy calculation.
- 14.11. To the extent that it has a discretion under paragraph 5 of the 2006 Determination (allowing the Board to calculate a levy where the 2006 Determination fails to make provision enabling a calculation to be performed) that is not relevant.
- 14.12. To the extent that it has a discretion under paragraph 6 of the 2006 Determination (allowing the Board to recalculate the levy where the

information upon which the calculation has been based was incorrect or where a notification has been given in error) that is not relevant.

- 14.13. Paragraph 11 allows the Board to request further or amended information, but is designed to be used where the levy cannot be calculated because of missing information, which is not the case here. To the extent that this is relevant, the committee considered that it would be inappropriate to use this discretion because it may mean that it would need to be considered in every case where an EMM was used. Many schemes took part in the pilot exercise and all schemes had the same opportunity to make themselves aware of the rules relating to the levy.

CONCLUSIONS

15. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 of the Pensions Act 2004.
16. The reviewable matter in question is the amount of the risk-based levy required of the Scheme in the financial year 2006/07.
17. It is accepted by the parties that the Scheme is a multi-employer scheme. It has been submitted, on behalf of the Trustees, that this has not always been clear. The definition of a multi-employer scheme (Section 307) (see Appendix 1) refers to an occupational pension scheme in relation to which there is more than one employer. The confusion may have arisen, I believe, from the definition of employer (Section 318) as “an employer of persons in the description of employment to which the scheme in question relates”. However, I am inclined to agree with the PPF, that any uncertainty would attach to the status of W&D plc (Marston plc), in view of the fact that it no longer employed members of the Scheme. There can have been no doubt that W&D Trading was an employer in relation to the Scheme. Therefore, if it had been thought that the Scheme was not a multi-employer scheme, W&D Trading was the obvious scheme employer. It would be reasonable, therefore, to assume that the levies would be calculated by reference to this company.

18. Since the Scheme is a multi-employer scheme, the risk-based levy falls to be calculated by reference to the failure score for the employer with the most members, i.e. W&D Trading. The 2006 Determination makes provision for the failure score of another company to be taken into account under certain circumstances. In order for this to be the case, the Trustees would have had to have provided a certificate showing that there was a contingent asset in place.
19. The Trustees have explained that this could easily have been done because a parent company guarantee (from Marston's plc) for the full buy-out debt was already in existence. However, they did not take the steps necessary by the 31 March 2006 deadline, to allow the Board to take this into account for the 2006/07 levies. This seems largely to have been because they did not keep abreast of ongoing changes to the requirements from the PPF. It is perhaps understandable that the Trustees might have been caught out in this way having been involved in a pilot scheme and assuming that there would be little in the way of change from that. However, I am not persuaded that the Trustees could reasonably have expected to be specifically notified of any such changes. PPF took reasonable steps to publicise their requirements and the onus was on the Trustees (aided by their advisers) to make themselves aware of just what those requirements were.
20. The Trustees have suggested that they were not given sufficient opportunity to provide the necessary information/documentation to allow the PPF to take into account the failure score applicable to W&D plc (Marston plc). However, they had the same opportunity as every other scheme in that respect and, since the parent company guarantee was already in place, it should have been reasonably straightforward for them to have done so.
21. Where the 2006 Determination specifically provides for the submission of information and/or documentation after the 31 March 2006 deadline, it is because there has been some form of communications system problem, or the information previously submitted is incorrect or insufficient for the levy to be calculated. That is not the case here. I am not overly attracted by the PPF's argument that, to exercise any discretion in this case, might mean that all cases where an EMM was used would need to be reconsidered. That seems to me to be overstating the case. Nevertheless, I

am not persuaded that a refusal to exercise any discretion that might be open to the Board because the scheme in question has not availed itself of an opportunity that was open equally to all schemes could be considered perverse.

22. The Trustees did not submit a Scheme Structure form or a Participating Employers form; and it is particularly unfortunate that they did not submit a contingent asset certificate on or before 31 March 2006, given that the parental guarantee was actually in place. However, the PPF correctly and consistently based its calculation on the information it held at 31 March 2006, and the risk-based levy, therefore, falls to be calculated by reference to the EMM, i.e. W&D Trading.
23. The Board has calculated the risk-based levy in accordance with the provisions of its 2006 Determination. The Board is not, therefore, required to take any action.

CHARLIE GORDON
Deputy Pension Protection Fund Ombudsman

31 March 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.”

“307 Modifications of this Act in relation to certain categories of scheme

...

“multi-employer scheme” means an occupational pension scheme in relation to which there is more than one employer.”

“318 General interpretation

...

“employer”

(a) in relation to an occupational pension scheme, means the employer of persons in the description of employment to which the scheme in question relates.”

“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 –

...

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

- (a) “a risk-based pension protection levy is a levy assessed by reference to –

...

- (iii) 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 ...”

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 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.”

“24. Where the trustees or managers of the scheme, on or before 31 March 2006, provide to the Board one or more certificates, in such of the forms attached to this Schedule as Annex D as is appropriate, certifying that the scheme benefits from one or more contingent assets within the meaning of Appendix 4 to this Schedule, then the value of U for the purposes of paragraph 14 above shall, notwithstanding anything in paragraphs 16 to 21 above, be determined in the manner set out in Appendix 4.”

“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 ...”

“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) ...”