

## Ombudsman's Determination

Applicant	Mr E
Scheme	Plumbing and Mechanical Services (UK) Industry Pension Scheme (the <b>Scheme</b> )
Respondent	Trustee of the Plumbing and Mechanical Services (UK) Industry Pension Scheme (the <b>Trustee</b> )

## Complaint Summary

1. Mr E has complained that:-
  - The Trustee is seeking payment from him of a proportionate share of the Scheme's funding deficit. Mr E argues that the sum, estimated to be £977,000, is not recoverable by the Trustee as recovery is time barred under the Limitation Act 1980. Or, alternatively, under the Prescription and Limitation (Scotland) Act 1973.
  - Condition I of the Occupational Pension Schemes (Employer Debt) Regulations 2005 may have already been satisfied before the date of certification of the section 75 debt (the **Section 75 Debt**). Consequently, the debt is not due.

## Summary of the Ombudsman's Determination and reasons

2. Mr E has no defences available to the recovery of the Section 75 Debt. The complaint is upheld to the extent that the Trustee has contributed to Mr E's distress because of delays in calculating and notifying him of the estimated Section 75 Debt.

## Material facts

3. The Scheme is a centralised multi-employer non-segregated defined benefit (**DB**) scheme governed by Scottish law.
4. Mr E ran a plumbing business and was admitted to the Scheme as a participating employer in 1979. As the business was unincorporated, Mr E is personally liable to comply with the Scheme rules and any statutory obligations falling on employers under the Pensions Act 1995 (the **1995 Act**), or otherwise. In the case of companies

or other incorporated entities participating in occupational pension schemes, the individual directors will not be personally liable for the debts of the employer if the employer is made insolvent.

5. On 31 October 2011, Mr E retired, sold his business, and ceased to participate in the Scheme.

### **Employer Debt Requirements – History**

6. The employer debt requirements, now found in the 1995 Act, are part of an integrated regime introduced from 6 April 2005.
7. New employer debt requirements were introduced by the Government from 11 June 2003. On a scheme wind up with a solvent employer, the employer had to meet the scheme liabilities on an annuity buy out basis. Following a further change in law, all employer cessation debts on or after 2 September 2005, were calculated on a full annuity buy-out basis. Consequently, when an employer of a multi-employer occupational pension scheme ceased to participate in a scheme, an employer debt was triggered equal to the employer's share of the debt on an annuity buy-out basis.
8. In the case of a centralised non-segregated scheme for non-associated employers, such as the Scheme, there are many "orphan liabilities" which do not relate to particular employers. Broadly, the remaining employers who continued to participate after the method of calculating liability was changed to an annuity buy-out basis, remain potentially liable to fund these orphan liabilities.

### **Employer Debt Requirements – Current Law**

9. The Occupational Pension Schemes (Employer Debt) Regulations 2005 (the **Employer Debt Regulations**), as amended, currently sets out the circumstances in which an employer debt under section 75 of the 1995 Act, (**Section 75**), is to be treated as due from an employer (or former employer) in relation to a multi-employer scheme.
10. The employer debt regime under Section 75 applies, on a UK wide basis, to trust based occupational pension schemes. The Employer Debt Regulations are complicated and use multiple definitions which determine when an employer is liable for a Section 75 Debt and the extent of the employer's liability.
11. An "employment cessation event" occurs where an employer has ceased to employ at least one person who is an active member of the multi-employer scheme and at least one other employer, who is not a defined contribution employer, continues to employ at least one active member of the scheme.
12. Where the value of the assets of the scheme is less than the value of the scheme liabilities at that time, an amount equal to the employer's "share of the difference" is treated as a debt due from the employer. Broadly, the share of the difference is equal to the "liability share." It is a fraction equal to the proportion of the liabilities of the scheme, attributable to the employer, over the total liabilities of the scheme calculated

by reference to the cost of purchasing annuities to secure those liabilities outside the scheme. As it includes a share of the orphan liabilities, the remaining employers are liable for a share of the liabilities relating to former employees of other employers.

13. The High Court ruled in the case of Phoenix Venture Holdings Ltd v Independent Trustee Services Ltd [2005] EWHC 1379 (Ch) (20 May 2005), that the Section 75 Debt cannot be claimed, or enforced, until it has been calculated.
14. Regulation 5 (18) of the Employer Debt Regulations provides that the amount of the liabilities of a scheme which are to be taken into account for the purposes of section 75(2) and (4) of the 1995 Act must be certified by the actuary in the form set out in Schedule 1 to the Employer Debt Regulations.
15. Under the Employer Debt Regulations, the term “employer” includes former employers. Regulation 9 (3)(c)(iii) broadly provides that an employer shall not be treated as a former employer liable for its share of the Section 75 Debt if an employer cessation event has occurred and one of the “conditions A-K” is met.
16. Regulation 9 (14) of the Employer Debt Regulations states:

“Condition I is that a debt was treated as becoming due from him under section 75(2) or (4) of the 1995 Act but at the applicable time it is excluded from the value of the assets of the scheme because it is unlikely to be recovered without disproportionate cost or within a reasonable time.”
17. The Pension Protection Fund (**PPF**) was set up with effect from 6 April 2005 to provide a minimum level of compensation where an employer becomes insolvent and is unable to fund the cost of securing the liabilities of a DB pension scheme on wind up. The Pensions Act 2004 includes a provision designed to prevent employers compromising pension scheme liabilities. Regulation 2 of The Pension Protection Fund (Entry Rules) Regulations 2005 (the **PPF Entry Rules**) provides:

“Schemes which are not eligible schemes

...

2 (2) Except as otherwise provided in paragraphs (4) and (5) of this regulation, an occupational pension scheme which would be an eligible scheme but for this paragraph is not an eligible scheme where, at any time, the trustees or managers of the scheme enter into a legally enforceable agreement with an employer in relation to the scheme the effect of which is to reduce the amount of any debt due to the scheme from that employer under section 75 of the 1995 Act which may be recovered by, or on behalf of, those trustees or managers.”
18. The PPF Entry Rules can make it difficult for trustees to enter into compromises in relation to the recovery of a Section 75 Debt. Other than where a specific exception applies in the legislation, it may prevent PPF entry.

## Limitation and Prescription

19. The Limitation Act 1980 (the **Limitation Act**) gives time limits for different classes of action to be brought. If the action is brought outside these time limits, it provides a defence to the claim. It operates as a procedural rule of law which in certain circumstances renders certain claims unenforceable.
20. Section 9 of the Limitation Act prescribes a time limit of six years, from the date on which the cause of action accrued, in respect of sums recoverable by statute.
21. Paragraph 41(4) of the Limitation Act states:

“The repeal by this Act of section 14(1) of the Limitation Act 1963 and the corresponding saving in paragraph 2 of Schedule 2 to this Act shall extend to Northern Ireland, but otherwise this Act does not extend to Scotland or to Northern Ireland.”
22. Consequently, the Limitation Act does not apply to pension scheme trusts set up under Scottish law.
23. The Prescription and Limitation (Scotland) Act 1973 (the **1973 Act**) applies to occupational pension schemes subject to Scottish law such as the Scheme. Unlike the Limitation Act, prescription is a substantive rule of law which extinguishes certain rights and obligations after the applicable period. This means that after that period, the right or obligation ceases to exist and does not, like the Limitation Act, simply render the obligation unenforceable.
24. Schedule 1 defines the obligations to which section 6 (Section 6) of the 1973 Act: extinction of obligations by prescriptive periods of five years, applies.
25. Section 7(1) of the 1973 Act: extinction of obligations by prescriptive periods of 20 years, provides that:

“(1) If, after the date when any obligation to which this section applies has become **enforceable**, the obligation has subsisted for a continuous period of twenty years—

without any relevant claim having been made in relation to the obligation, and

without the subsistence of the obligation having been relevantly acknowledged, then as from the expiration of that period the obligation shall be extinguished:

Provided that in its application to an obligation under a bill of exchange or a promissory note this subsection shall have effect as if paragraph (b) thereof were omitted [emphasis in bold added].”
26. On 10 November 2017, the Trustee notified Mr E that he may have incurred a Section 75 Debt. The Trustee advised that it was currently unable to calculate the figure accurately. This was because of the complexities of applying the relevant legislation

to the Scheme. That same month, there were discussions between the administrators of the Scheme, (the **Administrators**), and Mr E concerning the Section 75 Debt.

27. In early 2018, the Administrators raised the issue of potentially entering a flexible apportionment arrangement. Mr E's son and a business partner now run an incorporated business.
28. Following advice from Counsel, the Scheme Actuary prepared a proposed methodology for the calculation of the Section 75 Debt.
29. In February 2018, the Trustee consulted employers on the proposed calculation methodology. The consultation document explained that it was "extremely difficult" for the Scheme to extract membership data for individual employers, as the data held was "member-centric." The cost of undertaking the Section 75 Debt calculations and pursuing payment each time an employer triggered an event, was likely to "exceed the recovery level in most cases".
30. The Trustee said that it had been in communication with its professional advisors, The Pensions Regulator (**TPR**), and the Department for Work and Pensions, (**DWP**), since 2005 regarding the challenges in applying the Employer Debt Regulations.
31. The Trustee explained that it had lobbied for a change in the law; or failing that, a special exemption from the Employer Debt Regulations for the Scheme. In 2014, following discussions with TPR, the Trustee decided to take steps to calculate and recover Section 75 Debts.
32. In the Trustee's updates to the remaining participating employers, the Trustee included a summary of advice on various issues relating to the calculation of Section 75 Debts. The updates acknowledged that the Trustee was keen to clarify issues relating to the Section 75 Debts, so that past debts could be pursued or disregarded because of the "disproportionate expense in seeking recovery".
33. The information indicated that, following earlier advice from Counsel, the Scheme Actuary had prepared a proposed methodology for the calculation of Section 75 Debts, which was discussed in consultation with Counsel.
34. In November 2018, the Trustee sent out a questionnaire to participating employers (the **Questionnaire**). It concerned whether "Condition I" might be applicable on the basis that the cost of recovering the Section 75 Debt would be disproportionate. Mr E failed to return the Questionnaire. He queried his obligation to meet a Section 75 Debt and raised a defence under the Limitation Act. On 30 November 2018, the Trustee advised that it did not consider that a defence applied.
35. Before issuing an initial estimate of the Section 75 Debt, the Administrators contacted Mr E on 17 June 2019. They explained that, in the absence of using any statutory easements, the Trustee could only legally resolve the issue if the Trustee was able to conclude that it would not be economical to pursue the Section 75 Debt.

36. Mr E subsequently contacted the Administrators on several separate occasions before he was sent a further copy of the Questionnaire on 25 June 2019. Later that same month, Mr E returned a partially completed Questionnaire.
37. On 5 August 2019, Mr E contacted the Administrators for an update. The Administrators advised that the Trustee required a fully completed Questionnaire, to enable the Trustee to consider the “legal easement” available to the Trustee. The Administrators explained that if Mr E failed to complete the Questionnaire in full, the Trustee would issue him with a Section 75 Debt notice detailing the estimated debt (the **Debt Notice**).
38. On 23 August 2019, the Administrators sent Mr E a Debt Notice and a new Questionnaire. The Administrators explained that the estimated Section 75 Debt included a share of the “orphan liabilities.” Mr E was warned that if he did not contact the Trustee within six weeks of the date of the letter, the Trustee would “follow up with a certified debt.”
39. Based on the financial information Mr E has provided to my Office, he has insufficient assets to meet the estimated Section 75 Debt, which amounts to £977,000.
40. I issued a preliminary decision on 13 August 2020. Mr E and the Trustee made further representations in response to that decision.

### **Summary of Mr E’s position**

41. Mr E’s main submissions are outlined below:-

- He was not notified at the time that a Section 75 Debt had been triggered. It was not until November 2017 that he was made aware of the position.
- He questions why the Trustee’s claim is not time barred under statutory limitation provisions from 31 October 2011, the date the Section 75 Debt was triggered.
- He would like me to determine whether he has a defence against the Trustee’s claim for the Section 75 Debt. Under the Limitation Act, the applicable time limit is six years. Under Scottish Law, the applicable time limit is five years.
- The 1973 Act was only enacted in December 2018. The Trustee obtained advice on the issue of the Section 75 Debt in 2017. While he is not a legal expert, he considers that the 1973 Act makes it more difficult for the Trustee to recover Section 75 Debts.
- It cannot be right that the limitation period, or “Prescription” under Scottish law, does not start to run until the Section 75 Debt is calculated and certified. Otherwise, they would be “rendered useless”. In theory, the Trustee could continue to delay matters before triggering a claim at a date of its choice.

- The case of Webber v Department for Education [2016] EWHC 2519 (Ch) raises similar issues.
- He does not consider that Scottish Law is “outside” the Limitation Act. Under the Limitation Act, a breach of Statutory duty has a six year limitation period.
- The Scheme falls under UK law, as it is a nationwide scheme.
- The Trustee was trying to “muddy the waters” by referring to “Prescription” instead of “time limitation”. The Limitation Act and the 1973 Act contain similar, if not identical provisions.
- The Trustee had been “very aggressive” towards him and employers in a similar position.
- He is unable to pay the Section 75 Debt. He has been retired for almost eight years; he does not own or jointly own a business or property. He and his wife are certain that the Trustee will force the sale of their home. This matter has caused him considerable distress as he considers he has done nothing wrong.
- He supplements his pension and State benefits with dividends from shares. His share portfolio was worth £68,942 on 13 August 2020. He has a limited sum in his bank account.
- He and his wife are in their seventies and have long term medical conditions. He plans to sell his shares to fund the cost of social care, as and when required.
- The Trustee “seem to be very determined not to help, when it is possible to be helpful in some cases.” If the criteria for Condition I are “vague”, the Trustee will not agree that it has been satisfied.
- He is grateful that I consider the matter justifies an award for distress and inconvenience. He is concerned that the award will “do more damage than good,” as it will make the Trustee more difficult for him to deal with.

### **Summary of the Trustee’s position**

42. The main submissions made on behalf of the Trustee are outlined below:-

- The Scheme was sufficiently funded on the calculation basis that applied on 6 April 1997.
- The Government changed how Section 75 operated in cases where an employer ceases to participate in a multi-employer scheme and there are insufficient assets to meet the benefits in full on the “buy-out” basis.

- The “buy-out basis,” which was introduced in 2005, was “more expensive” than the calculation basis under the previous legislation.
- The Trustee had for some time argued for a change in the law. Failing that, it had argued for a special exemption from Section 75 for non-associated industrywide multi-employer schemes.
- Historically, the Trustee did not seek to recover Section 75 Debts from departing employers. The Trustee took a “pragmatic approach” to the application of Section 75 to the Scheme.
- Given the likely recovery levels of what, in most cases, would be unaffordable sums from small plumbing businesses, the Trustee had always felt that the costs to calculate and pursue each Section 75 Debt would not be “justifiable”.
- The Trustee did not calculate Section 75 Debts while liaising with various governing bodies: there was a possibility of a change in the Employer Debt Regulations.
- By early 2014, the Trustee acknowledged that “meaningful” change in the law was unlikely to be forthcoming.
- The Trustee has subsequently taken steps to start recovering Section 75 Debts from all remaining participating employers, and any employers who remained liable to pay the debt. The only exception is where one of the other permissible methods of dealing with a debt applies. For example, flexible apportionment where available. This has involved taking professional advice from leading law firms and senior Counsel which has been a costly and time consuming process.
- The way the Scheme has recorded member data historically has made it “extremely difficult” to extract membership reports in respect of individual employers. The frequency at which members change employers has compounded the issue.
- No allowance was made for Mr E’s share of the Section 75 Debt in the Scheme accounts, or actuarial valuations, for years 2005 to 2014. Mr E’s Section 75 Debt, like the other Section 75 Debts due to the Scheme, could not be calculated. It is not possible to know how much could have been recovered had the Trustee been able to pursue Mr E at that time.
- Before a decision can be made on whether Condition I has been met, it is necessary to determine the amount of the Section 75 Debt. It is not possible to form a view on whether a Section 75 Debt can be recovered without disproportionate cost unless the amount is known.



- The Section 75 Debt in this case is less than 20 years old. Prescription does not start to run until the obligation became enforceable. The Scheme Actuary has not certified the Section 75 Debt. Consequently, the debt is not yet enforceable.
- The Administrators contacted Mr E on 17 June 2019, in accordance with the “careful” process in place at the time for issuing notices of the Section 75 Debts to employers. Understandably, the employers impacted may not have been expecting a Section 75 Debt.
- The Trustee empathises with Mr E’s frustration at the length of time that has passed since he last contributed to the Scheme.
- The Trustee agrees with the preliminary decision except that a distress and inconvenience award should not be made in the circumstances.
- The Trustee also considers that the distress Mr E has suffered is partly due to the application of pension legislation.
- The Trustee is aware that these “Section 75 issues” are causing distress to many employers, including Mr E. “This is one of the reasons why the Trustee has sought over a long period of time to engage with the DWP. That is, to explore the possibility of changes to legislation.
- The Trustee has always tried to deal with these matters as sensitively as possible. This is against the background that the Trustee has a legal obligation to collect the Section 75 Debts.
- Section 75 Debts may be triggered by employer related events without the Trustee having any knowledge of those events. The Trustee had no legal obligation to inform employers that they have triggered Section 75 Debts.
- The Scheme records needed to be extensively reconstructed to allow allocation of liabilities to statutory employers and the calculation of orphan liabilities. The issues with the Scheme records date back to the inception of the Scheme, which predates the 1995 Act.
- The delay in notifying Mr E that he had triggered a Section 75 Debt is attributable to the time taken to reconstruct the Scheme records and carry out the necessary calculations. It is also attributable to the extent of the work which needed to be carried out.
- Taking the facts, circumstances, and the legislative background into account the Trustee does not agree that there has been maladministration on the part of the Trustee.

43. The Trustee's legal advisers, (the **Advisers**), have clarified that the terms "pragmatic approach," was used to explain, in simple terms, the previous approach the Trustee took to the calculation of Section 75 Debts. The Trustee did not decide, or agree, to adopt a "pragmatic approach" to calculate or collect Section 75 Debts and accordingly no decision was made that Condition I was satisfied in the past. Nor did the Trustee receive advice to that effect. Consequently, there are no records of any discussions between 2005 and 2014 that documents the use of those terms.
44. The Advisers have provided a detailed summary of meetings and correspondence, that occurred between 28 April 2004 and 25 November 2014, on the issue of Section 75 Debts (the **Summary**).
45. The Summary acknowledges that the Trustee had made several previous representations to DWP and TPR to explain why it was unable to comply with the Employer Debt Regulations. It records that there was "no effective way" in which the Scheme records could allow an "accurate calculation of an individual employer's share of any discontinuance debt."
46. The Summary records that, in future cases, "employers would not be told that no [Section 75 Debt] is payable and the matter would be referred to the [Trustee] Board." It does not record that the Trustee concluded that Condition I had been satisfied in the past.

## Conclusions

### Condition I

47. The question of whether "Condition I" has already been satisfied, by the past actions of the Trustee in failing to pursue the Section 75 Debt for a number of years, was identified by my Office as being potentially relevant to Mr E's dispute against the Trustee. I note that the parties agreed that the complaint should be expanded to cover this point.
48. Where there is documentary evidence that trustees have concluded that "Condition I" has been met, no Section 75 Debt can be treated as falling due. In those circumstances, it would not be necessary for me to consider whether the applicant has a defence against recovery of the Section 75 Debt. Consequently, the issue of "limitation" or "prescription" would not arise.
49. For Mr E's complaint concerning Condition I to succeed, the evidence must support that the Trustee made a legally effective decision not to recover the Section 75 Debt between 2005 and 2014. Additionally, that the Section 75 Debt, otherwise recoverable, should be excluded from the value of the Scheme assets, because it is unlikely to be recovered without disproportionate cost or within a reasonable timeframe.
50. Having considered the evidence, I cannot conclude that the Trustee decided to exclude the Section 75 Debt. The Summary supports the view that no such decision

was taken by the Trustee at that time. There is nothing indicating that the Trustee decided not to collect the Section 75 Debt on the basis that Condition I had already been satisfied.

51. The Summary points to significant issues with the calculation of the Section 75 Debts due to problems associated with allocating “orphan” liabilities. I note that the Trustee considered apportionment arrangements as a method of dealing with the issue and engaged in extensive discussions with TPR. I note that the Trustee also had discussions with DWP, concerning the reasons for the Scheme’s inability to comply with the Employer Debt Regulations. Those discussions ultimately resulted in the closure of the Scheme to new employers in 2014.

### **Limitation Period/Prescription**

52. Mr E argues that the time limits under the Limitation Act, prevent the Trustee from pursuing the Section 75 Debt. He has highlighted that the Trustee made the claim more than six years after he ceased to employ individuals in active service. I acknowledge that Mr E has asked for a decision on whether any claim, treated as falling due in 2011, is time barred.
53. In the case of *Webber v Department for Education* [2016] EWHC 2519 (Ch), the High Court held that the applicable cut-off date for the purposes of the Limitation Act was the date when Teachers’ Pensions brought its claim during the course of The Pensions Ombudsman’s complaints procedure. That date was identified as being the receipt by my Office of Teachers’ Pensions’ response to Mr Webber’s complaint.
54. Section 9 of the Limitation Act provides for a limitation period of six year for sums recoverable by statute. As the Scheme is established under Scottish law, a defence under Section 9 does not apply here and the Limitation Act has no relevance to Mr E’s dispute. The fact that many aspects of UK pensions law apply in Scotland does not change the outcome. I am satisfied that the Scheme is a Scottish scheme to which the 1973 Act, and not the Limitation Act, applies.
55. Mr E’s complaint that any claim to recover the Section 75 Debt is prevented by the Limitation Act must therefore fail since the Scheme is governed by Scottish law. Consequently, it is not necessary for me to determine whether the Limitation Act is potentially applicable to employer debts. The question for me to answer is whether the prescription requirements under Scottish law mean that the Section 75 Debt cannot be pursued.
56. I am satisfied that an employer debt obligation does not fall within Section 6 of the 1973 Act. I am also satisfied that the long negative prescription of 20 years is the only prescription which could potentially apply in this case. As the Section 75 Debt has subsisted for less than 20 years, it cannot apply here.
57. Under section 7(1) of the 1973 Act, the 20 year prescription period runs from the date the obligation becomes enforceable. As noted in paragraph 13 above, the court has previously held that an obligation to pay a Section 75 Debt does not become

enforceable until it has been certified. So, as submitted by the Trustee, the claim that the 1973 Act prevents recovery of the debt also fails on this ground.

58. The issue of whether the Section 75 Debt is recoverable will be determined in accordance with the requirements of the 1973 Act. It is not correct, as alleged by Mr E, that the 1973 Act only came into force in 2018. A new Prescription Scotland Act 2018, was indeed enacted in 2018 and amended the 1973 Act in various respects. However, the 1973 Act has been in force for many years.
59. For the purposes of subsections (2) and (4) of the 1995 Act, the liabilities and assets to be taken into account, and their amount or value, “must be determined, calculated and verified by a prescribed person and in the prescribed manner”.
60. The Section 75 Debt is treated as falling due immediately before the employer ceases to participate in the scheme. However, the debt is not payable until it has been certified by the scheme actuary. Until the debt is certified, it has yet to become enforceable for the purposes of the 1973 Act.
61. Section 7(1) of the 1973 Act stipulates a prescription period of 20 years from the date the obligation becomes enforceable. In this case, 20 years from the date the Section 75 Debt is certified. I am satisfied that the prescriptive periods of five years under Section 6 of the 1973 Act do not apply in this case.
62. The estimated Section 75 Debt was not notified to Mr E until August 2019. It has still not been certified. So, for the purpose of Section 7(1), time has not started running as no Section 75 Debt is enforceable until it has been certified.
63. Notwithstanding this, the liability to pay a Section 75 Debt was treated as falling due in October 2011. Even if the evidence supported that it was certified at that time, an action to recover the debt would not be time barred under Section 7(1) until a period of 20 years has elapsed.
64. In the absence of a valid legal defence against recovery under the provisions of the 1973 Act, or evidence to support that Condition I has previously been satisfied, I find that the Section 75 Debt is recoverable.
65. I empathise with the very difficult position Mr E now finds himself in. I recognise that this situation is unlikely to achieve a beneficial financial outcome for him. In circumstances such as these, the party liable for the Section 75 Debt potentially faces bankruptcy if they cannot pay the Section 75 Debt. It would be appropriate for the Trustee to approach the recovery of the Section 75 Debts with some sensitivity given the impact on the employers and the circumstances in which they have become liable for that debt.
66. Although I have concluded that Condition I had not been satisfied in the past, the Trustee should still consider, before taking any steps to certify and collect any Section 75 Debt from Mr E, whether Condition I has now been satisfied in relation to him. In connection to this, I would note again that:

“Condition I is that a debt was treated as becoming due from him under section 75(2) or (4) of the 1995 Act but at the applicable time it is excluded from the value of the assets of the scheme because it is unlikely to be recovered without disproportionate cost or within a reasonable time.”

67. If the Trustee concludes that Condition I is not satisfied and that the Section 75 Debt should fall due and be collected, I would still expect the Trustees to consider (and if appropriate discuss with Mr E) all options for payment of the Section 75 Debt open to the Trustee. I acknowledge that the Trustee is required to act consistently with its fiduciary and statutory duties to collect the Section 75 Debt. Consequently, it is required to consider the available options within this context.
68. Mr E has suffered considerable distress in relation to this matter. I recognise that this is in part due to the application of pension legislation to his case rather than maladministration on the part of the Trustee.
69. The Trustee is obliged to collect any debts owed to the Scheme. It follows that pursuing a debt where required to do so by law cannot amount to breach of law. Similarly, if the way the debt is collected is appropriate in the circumstances, it cannot constitute maladministration. Any action that compromises a Section 75 Debt that is due to the Scheme may also potentially prevent the Scheme's eligibility for PPF entry.
70. I can find no compelling evidence that the steps taken by the Trustee to pursue the Section 75 Debt were aggressive in Mr E's case. Consequently, there is no maladministration in this respect.
71. I note that the Trustee lobbied the Government for a change in the law to mitigate the impact of the employer debt legislation in cases where individual employers face hardship if the Section 75 Debt is enforced. I acknowledge that in early 2014, the Trustee acknowledged that a “meaningful” change in the Employer Debt Regulations was unlikely. That said, Mr E should have been notified that he had triggered a Section 75 Debt at an earlier stage and informed of any issues impacting the calculation.
72. It was not until November 2017, six years after Mr E ceased to contribute to the Scheme, that he was made aware of the position. I appreciate that the delay was in part due to difficulties calculating the Section 75 Debt because of issues with the Scheme's records and with calculating orphan liabilities. I accept that extensive work needed to be carried out on the Scheme records. I do not agree that this materially changes the outcome in the circumstances.
73. The Trustee was aware before November 2017, that a Section 75 Debt had been triggered. I find that the delay in notifying Mr E of the estimated Section 75 Debt amounts to maladministration. Mr E was denied an opportunity to resolve the situation he is now facing at an earlier date. This is likely to have seriously contributed to his level of distress.

74. Having considered Mr E's individual circumstances, I find that an award of £1,000 is appropriate in recognition of the serious non-financial injustice the delays and inaction on the part of the Trustee has caused to him. In reaching this view, I have taken into account the fact that the Trustee is ultimately responsible for the quality of the Scheme data.

75. The complaint is partly upheld.

## **Directions**

76. Within 14 days of the date of this Determination, the Trustee shall pay £1,000 to Mr E in respect of the non-financial injustice the Trustee has caused him to suffer. It is open to Mr E to refuse the award.

**Anthony Arter**

Pensions Ombudsman  
9 November 2020