

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

**Applicant** : Mr D Hemington on behalf of the Trustees of the Hoval Limited Pension Plan (the **Trustees**)

**Scheme** : The Hoval Limited Pension Plan (the **Scheme**)

1. The Pension Protection Fund (the **PPF**) Ombudsman has received a reference of a reviewable matter, following a decision by the Reconsideration Committee (the **Committee**) of the PPF dated 20 June 2008.

**Grounds for Referral**

- To determine the relevant failure score, Dun & Bradstreet (**DBUK**) referred to the accounts of Hoval Limited (the **Employer**) for the year ended 31 March 2006. These showed a loss for the year of £2,365,000, but the Directors' Report, attached to those accounts, referred to significant actions taken to improve the Employer's trading performance and to strengthen the balance sheet. The impact of certain of these actions was to increase Equity Shareholders' funds, by £1,644,500. An extract from the 'Report of the Directors' stated:

**"FUTURE OUTLOOK AND GOING CONCERN**

Current trading is not satisfactory and the Directors are taking steps to eliminate loss-making activities, increase sales volumes for profitable merchandised products and to reduce the cost of manufactured products.

The loss for the year and the requirement of FRS17 to account for the deficit on the pension scheme in the accounts of the Company have resulted in a deficit of Equity Shareholders' funds. The loss for the year has also had an impact on the Company's cash resources. The Parent Company Interhoval AG considers Hoval Limited to be a strategic part of the Hoval group as it provides access for group products to the United Kingdom market. To demonstrate its commitment to the Company it has provided a letter of support dated 31 March 2006, valid until 30 September 2007, which states that "It is in our interests that the Company meets its financial obligations at all times. It is our policy to provide the Company with such support and assistance as may be required to ensure that it maintains capital and liquidity levels to enable it at all times to meet its financial obligations as they fall due in conformity with standards of prudence generally accepted in its field of

business.” In accordance with this policy the Parent Company has allowed the Company to delay payments of intercompany debts beyond their due date for payment.

#### **POST BALANCE SHEET EVENTS**

In addition, subsequent to the year end, the Parent Company has:

- waived payment of 2 million Swiss Francs (about £882,000) of intercompany debts;
- provided capital contribution of £762,500, which has been used by the Company to repay its intercompany loans in full.

The impact of these actions is to increase Equity Shareholders’ funds by £1,644,500.

#### **PRINCIPAL RISKS AND UNCERTAINTIES**

The attractiveness of the UK market for sales of condensing boilers continues to encourage increased competition from overseas manufacturers. The UK based shell boiler manufacturers remained locked in price competition.

#### **KEY PERFORMANCE INDICATORS**

The board monitors progress against the Company’s strategy by reference to the following:

- continuous monitoring of product range to ensure it meets the needs of the UK market;
- progress of introduction of new products measured against critical path bar chart-monthly comparison of sales and order intake with budget.”

- These actions, by the parent company, were shown in the 31 March 2006 accounts, as post balance sheet events, but were not taken into account by DBUK in their assessment of the failure score.
- The latest funding update, received by the Trustees, suggests a smaller funding deficit than as at 5 April 2005 (per scheme return dated 30 November 2006), or as estimated at 31 October 2006 (per levy invoice).
- The failure score of 19, does not accurately reflect the true position of the Employer, as disclosed by the full set of accounts. The current failure score, based on the accounts for the year ended 31 March 2007, is 56 (equivalent to 84 on the scoring system used by DBUK, at 31 March 2006).
- The Scheme closed to future accrual at 31 July 2007, and the parent company/Employer are budgeting £200,000 per annum to reduce the deficit,

either by direct contributions or by offering enhanced transfer values. Payment of the excessive levy will negate this.

## RECONSIDERATION COMMITTEE'S DECISION

2. The Committee's decision was to uphold the Review Decision and thereby to uphold the Board's calculation of the amount of the pension protection levy for the Scheme, in respect of the period 1 April 2007 - 31 March 2008, as set out in the invoice dated 23 November 2007.

3. The factual matters of the case:

- The Scheme is a single employer scheme.
- A Section 179 valuation, with an effective date of 6 April 2005, was submitted to the Board on 27 March 2006 and was used in the levy calculation for 2007/2008.
- The Scheme made representations to DBUK, about the failure score applicable to Hoval Limited (the Employer), as at 30 March 2007. DBUK have confirmed that the score originally advertised is correct.
- The Scheme did not submit a deficit reduction contribution certificate, nor any other voluntary certificates, by the relevant prescribed deadlines.
- The Board's consultation process, for the risk-based levy, is set out in the following chronology:

11 September 2006	Board issued 2007/2008 Pension Protection Levy consultation.
9 October 2006	Consultation period closed.
21 December 2006	Board issued 2007/08 Pension Protection Levy Estimate consultation.
2 February 2007	Consultation period closed.
March 2007	Consultation responses published.
1 March 2007	Determination under Section 175(5) Pensions Act 2004 published.
30 March 2007	Deadline for submission of: Contingent asset certificates. Section 179 valuation certificates. Scheme return updates.

30 March 2007	Date at which DBUK take Failure Score for levy purposes.
5 April 2007	Deadline for submission of deficit reduction contribution certificates.
August 2007	Board published information paper 'Modelling Uncertainty - an introduction to the Pension Protection Fund Long Term Risk Model'.

- 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 levy is to be assessed;
  - The time or times by reference to which those factors are to be assessed;
  - The rate of the levy; and
  - The time at which the levy become payable.
- The Board published its final determination of these matters for financial year 2007/08 on 1 March 2007 (**the 2007 Determination**).
- The Applicant had asked for a reconsideration of the amount of the Scheme's risk-based levy. Reconsideration of the amount of the levy, is a reconsideration of the amount of the levy in a particular case, and not a reconsideration of the Board's Determination under Section 175(5). The scope of the reconsideration is whether the calculation in respect of the Scheme's levy invoice was carried out in accordance with the published Determination. Neither the Board (at review stage), nor the Reconsideration Committee, has any discretion to depart from the Determination in calculating the amount of the levy.
- As set out in paragraphs 18-20 of the Schedule to the Determination, the risk-based levy is calculated using the formula:

$U \times P \times R \times c$ , subject to a cap of 0.0125 multiplied by the Scheme's protected liabilities.

#### 4. Legal Matters

- As provided in paragraph 32 of the Schedule to the Determination, the failure scores provided to the Board by DBUK, are the normal failure scores which were, or would have been, assigned to the relevant employer by DBUK in the ordinary

course of its business and as at 30 March 2007. Neither DBUK, nor the Board, are entitled to depart from the approach prescribed in paragraph 32.

- Section 179 valuation data, submitted by the Scheme on 27 March 2006 and adjusted to provide an estimated position as at 31 October 2006, was used to calculate the Scheme's 2007/08 levy. The Board notes that the Determination does not distinguish between schemes closed to future accruals and those that are not. In any event, the Scheme became closed to future accruals after the estimated position as at 31 October 2006 had been calculated.
- The only deficit reduction contributions which can be taken into account, are those which are either i) reflected in up to date valuation data provided to the Board or the Pensions Regulator by 30 March 2007, in accordance with paragraph 8, of the Schedule to the Determination, or ii) meet prescribed criteria, paid over to the trustees irrevocably before 31 March 2007 and certified to the Board before 5 April 2007, in accordance with paragraph 28 of the Schedule to the Determination. The steps by way of deficit reduction referred to by the applicant, are presently only intended/future steps and were not reflected in the way, and by the deadline, set out above, so they cannot be taken into account.

#### **WRITTEN REPRESENTATIONS FROM THE PPF**

- The Board is obliged to calculate the Scheme's levy on the basis of the Determination, which it has done. DBUK have provided a failure score assigned to the Scheme's relevant employer, in accordance with the terms of the Determination: "the normal failure scores which were or would have been assigned to that employer by DBUK in the ordinary course of its business on and as at 30 March 2007";
- The Determination provides for DBUK to provide the Board with a corrected failure score in certain circumstances, for example, following a successful appeal, in which it becomes apparent that the failure score allocated is incorrect. Here, DBUK have not so notified the Board, and as set out in the review and reconsideration decisions, the Scheme's levy invoice was calculated correctly;
- The Applicant raises the question of the methodology applied by DBUK in assessing failure scores. The Board decided and incorporated into its levy

Determinations for 2006/07 and 2007/08, information from an external provider, DBUK, to calculate failure scores. On this basis the Board is, in effect, making use of a pre-existing, commercially available, set of information. DBUK were engaged following a detailed consultation and tender process. It has never been feasible for the Board to commission a universe of failure scores, created especially for its own purposes. Subject to a very few defined modifications identified in the Determination, the Board must therefore take DBUK's system as it finds it;

- The detailed approach applied by DBUK in allocating failure scores is not a matter for the Board, provided its analyses are robust, objectively justifiable and applied consistently. The Board understands that for DBUK to review notes to accounts and directors' reports in every case, would not only introduce a degree of subjectivity to the exercise, but would also require considerably greater outlay on the part of DBUK, since individual analysis would be required for each and every set of annual report and accounts filed at Companies House;
- DBUK, do not, as part of their standard procedure take post balance sheet events into account. For them to do so, even for PPF purposes only, would of course involve an individual analysis of the filed report and accounts of each employer for the 7,800 or so PPF eligible schemes (many of which are multi-employer schemes), whereas the information used in its standard procedure is provided to it from accounts filed at Companies House via an automated system;
- The only circumstance in which the Determination permits a departure from the normal failure score methodology, used by DBUK, is in relation to the matters set out in a) to g) of paragraph 32 of the Schedule to the Determination and in setting the crystallisation date for the failure score. The failure score must be the normal failure score which was or would have been assigned to that employer, by DBUK, in the ordinary course of its business on and as at 30 March 2007, based on data provided to DBUK, on or before 29 March 2007.

#### **WRITTEN REPRESENTATIONS FROM THE TRUSTEES**

- The Board has failed to properly assess the likelihood of an insolvency event and as a result has treated the Scheme unfairly;

- The applicant questions why the Board must "take DBUK's system as it finds it", when it is apparent that it is fundamentally flawed as it does not take account of all the information provided in a set of financial statements;
- The applicant submits that the DBUK analyses are not "robust and objectively justifiable" as claimed by the PPF, in that they do not take account of all of the information provided in a set of financial statements, including significant post balance sheet events. Information which is required by the UK Generally Accepted Accounting Practice, in order to give a true and fair view of an employer's financial state of affairs at its financial year end;
- The PPF state that *"The Board understands that for DBUK in every case to review notes to accounts and directors' reports would not only introduce a degree of subjectivity to the exercise but would also require considerably greater outlay on the part of DBUK, since individual analysis would be required for each and every set of annual report and accounts, filed at Companies House."*
- It is ignorance of information that is required by the UK Generally Accepted Accounting Practice, and which contributes to a true and fair view of a company's state of affairs, that leads to subjectivity. It is accepted that post balance sheet events can affect the accounts, yet in this case, a proposal to increase equity shareholders' funds by £1,644,500, that would have had a significant impact on the assessment is ignored, resulting in an unfair assessment;
- The *"greater outlay on the part of DBUK"* is of no relevance, as it is this flawed approach which, depending on the outcome of this appeal, may result in a significantly greater outlay on the part of the Scheme.

## CONCLUSIONS

5. This is a reviewable matter, by virtue of paragraph 19 Schedule 9 to the Pensions Act 2004. The reviewable matter in question is the amount of the risk-based levy required of the Scheme for the financial year 2007/08.
6. Section 175(2) of the Pensions Act 2004, provides for the risk-based levy to be assessed taking into account, among other things, the likelihood of an insolvency event occurring in relation to the Employer. Under Section 175(5), the Board were

required to determine the factors by reference to which the 2007/08 levies were assessed; those factors were set out in the 2007 Determination. I accept that the Determination itself is not a reviewable matter, nor is the Board able to amend the Determination on an individual application for review or reconsideration.

7. The application before me centres on the methodology applied by DBUK when calculating the failure score. It is asserted that DBUK failed to take into account post balance sheet events which were properly reflected in the relevant accounts and that the failure score did not reflect the true position of the Scheme as at 30 March 2007.
8. DBUK's procedure involves using information extracted from accounts filed at Companies House via an automated system. Any post balance sheet events which would affect the accounts will, presumably, be reflected therein. I see no reason to criticise that procedure.
9. The PPF have stated that they must accept DBUK's system "as they find it", and for DBUK to review notes to accounts and directors' reports, would be costly and would introduce a degree of subjectivity. I can well understand that it would be extremely difficult to adopt a system which sought to take into account all possible factors affecting a company's viability. The Determination itself sets out the circumstances in which there may be a departure from the DBUK failure score supplied. The fact that there may be post balance sheet events which could affect that failure score, is not one of the exceptions listed at sub-paragraphs (a) to (g) of paragraph 32 of the Determination. The PPF have, therefore, calculated the levy in accordance with the Determination.
10. The complaint is not upheld.

**CHARLIE GORDON**

Deputy Pension Protection Fund Ombudsman

24 March 2009



**APPENDIX****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 –
  - (c) a risk-based levy is a levy assessed by reference to –
    - (i) the difference between the value of the scheme’s assets (disregarding any assets representing the value of any rights in respect of money purchase benefits under the scheme rules) and the amount of its protected liabilities,
    - (ii) except in relation to any prescribed scheme or scheme of a prescribed description, the likelihood of an insolvency event occurring in relation to the employer in relation to the scheme, and
    - (iii) if the Board considers it appropriate, one or more other risk factors mentioned in subsection (3) ...
- ...
- (5) The Board must, before the beginning of each financial year, determine in respect of that year -
  - (a) the factors by reference to which the pension protection fund levies are to be assessed,
  - (b) the time or times by reference to which those factors are to be assessed,
  - (c) the rate of the levies, and

- (d) the time or times during the year when the levies, or any instalment of levy, becomes payable.

...”

“181 Calculation, collection and recovery of levies

...

(3) The Board must in respect of the levy -

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

...

(8) Regulations may make provision relating to –

- (a) the collection and recovery of amounts payable by way of any levy ...
- (b) the circumstances in which any such amount may be waived.”

“Schedule 9

Reviewable Matters

...

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

**“Determination under  
Section 175(5) of the Pensions Act 2004 in respect of the  
financial year 1 April 2007 – 31 March 2008**

8. Where this Schedule indicates that the Board should use “relevant scheme return data”, the Board will take account of –

(a) The latest submitted scheme return for the scheme concerned which is provided to the Pensions Regulator in accordance with sections 63-65 of the Pensions Act 2004 at or before 5.00pm on 30 March 2007; and

(b) Information contained in the latest submitted scheme return documentation provided to the Pensions Regulator or the Board on a voluntary basis or pursuant to Section 191 of the Pensions Act 2004 (including, in the case of a scheme divided into sections as referred to in paragraph 7 above and without limitation, any information provided to the Board on forms made available by the Board for the purpose) and which is received by the Pensions Regulator or the Board as the case may be at or before 5.00pm on 30 March 2007; and

(c) Information which supplements, corrects or updates information contained in a scheme return or equivalent falling within sub-paragraphs (a) or (b) above, where such information is provided to the Board or the Pensions Regulator on or before 5.00 pm on 30 March 2007, or where it is provided after that date but in response to a request or requirement of the Board or of the Pensions Regulator, and is received prior to the calculation of the levies in relation to the scheme concerned. Such information shall be treated as forming part of the scheme return in question. Information (“valuation update data”) which purports to update valuation information previously provided to the Board or the Pensions Regulator shall only be taken into account if (a) the valuation update data correspond to a more recent Minimum Funding Requirement or section 179 valuation (as referred to in paragraphs 9 and 10 below) which has been prepared and signed by the actuary in accordance with applicable legislation; and (b) all relevant valuation data previously provided are similarly updated to take account of that more recent valuation.

....

28 Where there is provided to the Board, on or before 5.00pm on 5 April 2007, a certificate, given in the form attached to this Schedule as Annex B by the actuary appointed in relation to the scheme for the purposes of section 47 of the Pensions Act 1995, that a deficit-reduction contribution or contributions has been made since the date to which the section 179 or, as the case may be, Minimum Funding Requirement valuation referred to in paragraph 10 above (“the previous valuation”) relates, then for the purposes of this Schedule the value of the assets of the scheme shall be increased by the aggregate amount of that contribution or contributions. For this purpose, a deficit-reduction contribution is the whole or any part of a contribution made by or on behalf of the employer in relation to the scheme (including by HM Revenue and Customs in respect of age-related National Insurance rebates) which:

(a) Has been received, irrevocably and in full, by the trustees or managers

of the scheme before the actuary's certificate is signed and not later than 31 March 2007; and

(b) Is not a contribution made on account of –

(i) The cost of accrual of scheme benefits;

(ii) The expenses of administering the scheme or investment management expenses; or

(iii) The cost of augmentations of benefits granted or expected to be granted after the date to which the previous valuation relates; or

(iv) Any benefits or transfers paid out of the scheme between the end-date of the audited accounts used for the purposes of the previous valuation and, if later, the valuation date

(for which purposes the costs referred to in sub-paragraphs (i) and (iii) above shall be calculated on the basis required for a section 179 valuation).

For the avoidance of doubt, where in relation to a scheme (i) an equivalent deficit reduction

certificate was provided to the Board on or before 7 April 2006 and was taken into account by the Board in the calculation of that scheme's risk-based levy for the year 1 April 2006 – 31 March 2007, and (ii) paragraph 10 above requires the Board to use the same valuation for the purposes of the risk-based levy for the period 1 April 2007 – 31 March 2008 as was used for the calculation referred to in (i), then the Board shall take into account the previously given certificate for the purposes of the risk-based levy for 1 April 2007 – 31 March 2008. Where in relation to the same scheme more than one certificate in relation to deficit-reduction contributions has been provided to the Board (irrespective of when provided), only the most recent such certificate shall (provided it satisfies the other requirements for recognition set out in this Determination) be taken into account.

29....,

30. P (the insolvency probability associated with the employer(s) in relation to the scheme) shall be:

(a) In the case of a scheme with a single employer, an amount equal to the Pension Protection Fund assumed probability of insolvency for that employer determined in accordance with paragraphs 31 to 34 below; and

(b) In the case of a scheme with more than one employer, an amount calculated in accordance with paragraphs 35 to 39 below; provided that if such amount exceeds 0.15, then P shall be taken to be 0.15.

31. The Pension Protection Fund assumed probability of insolvency for an employer shall be the assumed probability associated with the Failure Score which applies to that employer, as shown in Appendix 3 to this Schedule, or a figure determined in accordance with paragraphs 32(f) or (g), 33 or 34 below.

32. The Failure Score which applies to an employer shall be the failure score which Dun & Bradstreet UK Ltd ("DBUK") informs the Board that it has assigned to that employer, after taking such steps to identify or obtain data relating to that employer as the Board has required. For the avoidance of doubt, the failure scores to be provided to the Board are to be the normal failure scores which were or would have been assigned to that employer by DBUK in the ordinary course of

its business on and as at 30 March 2007, based on data provided to D&B on or before 29 March 2007, save only that –

- (a) The Board has instructed DBUK that the failure scores provided to the Board should be those which would be assigned to the employer if there were to be disregarded any rule or practice whereby DBUK normally limits the maximum failure score obtainable by any company which has a negative tangible net worth;
- (b) The Board has further instructed DBUK that the failure scores provided to the Board should be those which would be assigned to the employer if there were to be disregarded any rule or practice whereby DBUK normally limits the maximum failure score obtainable by a company where it is a subsidiary of another company and that parent company is regarded as being at severe risk of insolvency;
- (c) The Board has further instructed DBUK that the failure scores provided to the Board should be those which would be assigned to the employer if there were to be disregarded any rule or practice whereby DBUK normally limits the maximum failure score obtainable by any company which files its accounts in a currency other than sterling;
- (d) The Board has further instructed DBUK that, in the case of an employer satisfying one or more of the conditions set out below, the failure score provided to the Board should be that which would be assigned to the employer if any effect on the failure score caused by the existence of county court judgments (“CCJs”) against the employer were to be reversed. The conditions, which shall be tested against the information held by DBUK at the time the failure score is determined, are:
  - (i) The number of employees of the employer exceeds 500;
  - (ii) The total sales of the employer exceeds £50 million;
  - (iii) The total assets of the employer exceed £50 million;
  - (iv) The number of employees of the employer is not less than 10 and the aggregate value of CCJs in the five years preceding the date on which the failure score is given is less than £750;
 or
  - (v) The number of employees of the employer is less than 10 and the aggregate value of CCJs in the five years preceding the date on which the failure score is given is less than £100.
- (e) This sub-paragraph applies in any case where DBUK informs the Board that it has decided, following representations made to it by or on behalf of the relevant trustees or managers or employer, that the failure score assigned to an employer on and as at 30 March 2007 was either too high or too low because it was based upon information which, on and as at 30 March 2007, was incorrect or incomplete by comparison with the information which should normally have been taken into account by DBUK in assigning a failure score at that date (whether because information which should normally have been available to DBUK at that date was not available to DBUK, or because such information was available to DBUK but was nonetheless not taken into account in assigning the failure score). In a case to which this sub-paragraph applies, the Failure Score shall be the higher or lower failure score which DBUK informs the Board ought to have been assigned to the employer on and as at 30 March 2007. For

these purposes, the Board shall only be obliged to take into account a change to a failure score if it results from representations made to DBUK not later than 28 days after the date shown on the original notification. In a case to which this sub-paragraph applies the Board will where necessary issue a revised notification of the amount of the levies in respect of the scheme;

(f) In the case of employers which are not registered in the United Kingdom, the Board has, subject to sub-paragraph (g) below, instructed DBUK to provide it with the failure score or local equivalent (if any) assigned to such employers by DBUK's relevant associated undertaking, or in the absence of such a failure score or equivalent, with the risk indicator assigned to the employer in question. In such cases the assumed probability of insolvency associated with that failure score or risk indicator will be such as the Board has been advised is appropriate for the purposes of achieving equivalence with Appendix 3 to this Schedule. Sub-paragraph (e) shall apply to such assumed probabilities of insolvency, for which purposes the Board shall only be obliged to take into account a change to an assumed probability of insolvency if it results from representations made to DBUK not later than 28 days after the date shown on the original notification.

(g) This sub-paragraph applies in the case of any employer for which DBUK or its relevant associated undertaking does not ordinarily provide a failure score or its equivalent or a risk indicator, because the employer is already the subject of an insolvency procedure, including without limitation administration or winding up in the United Kingdom or proceedings under Chapter 7 or 11 of the United States Bankruptcy Code. In a case to which this sub-paragraph applies, the Board will use such insolvency probability as the Board has been advised would be appropriate for an undertaking with a failure score of 1 in the employer's jurisdiction of incorporation. If such a failure score is not available in that jurisdiction, the Board shall use the insolvency probability set out in Appendix 3 to this schedule for a UK employer with a failure score of 1."