

Ombudsman's Determination

Applicant	Richard Squires (Pensions Manager and Secretary) on behalf of the Jaguar Land Rover Pension Trustees Limited (the Trustees)
Scheme	Land Rover Pension Scheme (the Scheme)
Respondent	Pension Protection Fund (PPF)

The Pension Protection Fund (**PPF**) Ombudsman has received a referral of a reviewable matter, following a decision by the Reconsideration Committee of the PPF dated 11 June 2014. The referral concerns the Scheme's risk-based levy for the 2013/2014 levy year, which is a reviewable matter under paragraph 19 of Schedule 9 to the Pensions Act 2004.

Background

1. The referral relates to the calculation of the risk-based pension protection levy for the Scheme for the levy year 2013/2014. The Scheme's sponsoring employer is Jaguar Land Rover Limited (the **Employer**).
2. The PPF's invoice dated 20 December 2013, included a calculation of the risk-based pension protection levy for the Scheme in the sum of £2,446,869. The calculation did not include any allowance for a Type A contingent asset which had been submitted by the Trustees (the **Guarantee**) - and given by Jaguar Land Rover Holdings Limited (the **Guarantor**) - in favour of the Scheme. It was not included because the PPF had decided that the contingent asset did not meet the guarantor strength requirement specified in Rule G2.3 of the 2013/2014 Levy Determination (the **Determination**).
3. The definitions section of the Determination said that a "contingent asset" was "defined in Rule G2.2" and "contingent asset certificate" was "a certificate which complies with Rule G2.4.". Rule G2 said, so far as is relevant to this referral:

"G2. Current Contingent Assets

G2.1 When does this Rule G2 apply?

This Rule G2 applies where the Board is satisfied that there has been submitted by or on behalf of the Scheme trustees, before the relevant Measurement Time:

(1) a Contingent Asset Certificate; and

(2) satisfactory hard copy supporting documents, as required by the Contingent Asset Appendix.

G2.2 What is a Contingent Asset?

A “Contingent Asset” must be one of either:

(1) a Type A Contingent Asset, which is a guarantee from a parent company or any relevant associated undertaking in Acceptable Form and which complies with paragraphs 6 and 7 of the Contingent Asset Appendix;

...

and in all cases it must comply with Rule G2.3.

G2.3 Further provisions about Contingent Assets

(1) The Contingent Asset must comprise or result from an arrangement which becomes or became effective no later than 1 April 2013 except in the case of a New Scheme where it may take effect on the date on which the New Scheme becomes a Scheme if that is later.

(2) It must appear to the Board that:

(i) the Contingent Asset reduces the risk of compensation being payable from the Board in the event of an insolvency event occurring in respect of an Employer in relation to the Scheme; and

(ii) the reduction, if any, in a Scheme’s levy that may result from the recognition of a Contingent Asset for levy purposes is reasonably consistent when compared with the level of that reduction in risk.

(3) Where Rule G2.3(2)(ii) is not satisfied but the Board’s requirements for a Contingent Asset are otherwise met, and it appears to the Board that Rule G2.3(2) would be satisfied if the Contingent Asset were to be recognised in part, the Board may recognise the Contingent Asset to the extent that the Board deems consistent with the reduction in risk. The Board is under no obligation to take into account any Contingent Asset under this Rule G2.3(3).”

4. On 13 January 2014 the Trustees applied for a review of the PPF’s decision not to recognise the Guarantee for the purposes of the calculation of the risk-based pension protection levy. Broadly, the Trustees submitted that they took extensive legal and covenant advice to ensure that the certification was appropriate in light of the guidance published by the PPF; so the PPF could only have rejected the Guarantee on the basis that they failed to adopt a similar level of analysis of the Guarantor as that taken by the Trustees. Further, the Trustees submitted that the Guarantee is one which would provide access to additional assets to those which would have been called on in the event of the insolvency of the Employer. The Trustees did not agree

that the Guarantor is unable to meet its liabilities under the Guarantee (in the event that it was called upon to do so); of the Guarantor's key assets one (which I understand refers to Jaguar Land Rover Auto Trade (Shanghai) Co Limited (**JLR Shanghai**)) holds c.£400m of cash at any one time and the other (which I understand refers to Chery Jaguar Land Rover Automotive Co Limited (the **JLR Joint Venture**)) is worth in excess of £1bn. Further, the Trustees submitted that both JLR Shanghai and the JLR Joint Venture would not be impacted by the insolvency of the Employer, so the combined assets of JLR Shanghai and the JLR Joint Venture would be sufficient to support a claim by the Scheme under the Guarantee of c.£762m. The Trustees, therefore, said that they were firmly of the view that the Guarantee should be recognised by the PPF in the Scheme's risk-based levy calculation.

5. The PPF's Review Decision was made on 10 April 2014. The PPF upheld the decision not to recognise the Guarantee. The reasons provided by the PPF were as follows:

"7. The initial decision communicated to the Scheme was based on concerns regarding the structural relationship between the Guarantor and the employer [i.e. the Employer, as defined previously], specifically that the Guarantor's net asset value at 31 March 2013 predominantly related to its investment in the employer. The implication of the structure is that in the event of an insolvency of the employer, the Guarantor is not likely to have sufficient non-employer related assets to repay its obligations arising under the guarantee. The additional information provided by the Scheme, whilst offering further detail regarding the financial strength of the employer and the consolidated Jaguar Land Rover Group in the financial year ended 31 March 2013, does not detail any material change to the Group's structure [i.e. the consolidated Jaguar Land Rover Group] which could mitigate the risk of the employer's insolvency and support the Guarantor's ability to meet its guarantee obligations.

8. The Scheme has provided material at review stage that seeks to demonstrate that there are additional assets available that would not be available on the insolvency of the employer JLR, notably the c£400m cash held by the national sales company [JLR Shanghai] and the £1bn value of the joint venture [the JLR Joint Venture]. However, no actual evidence has been provided as to either of these figures - the £400m figure is as advised to the Trustee by group management, and the £1bn figure is a market estimate of the joint venture. Neither appears to take account of the impact of the failure of the employer on the availability of funds. For example, it may be difficult to realise value from a joint venture in an insolvency scenario. The evidence provided does not demonstrate the extent of Holdings' [the Guarantor] investments in these entities and how much of the headline asset figure of £1.4bn is actually available to Holdings and realisable in the event of an insolvency of JLR.

9. The fact that the Trustee took detailed legal and covenant advice in certifying the contingent asset which was then rejected does not mean that the Board undertook a lesser level of analysis than the Trustee. The test applied by the

Board when considering the strength of a guarantor of a Type A contingent asset is more stringent than that required by trustees certifying as to such guarantor strength, as outlined in paragraph 5.3 of the Board's Guidance [i.e. the Guidance on Contingent Assets (the **Guidance**)] in relation to contingent assets."

6. On 7 May 2014, the Trustees applied for a reconsideration of the PPF's Review Decision.
7. In their application the Trustees submitted that JLR Shanghai was not exposed to manufacturing risks and its balance sheet comprised sales to in-country distributors (i.e. in China) less payments due for vehicles imported. Approximately 21% of vehicles manufactured by Jaguar Land Rover were sold in China; publicly available information demonstrated that this market contributed c.£3.3bn of revenues and £500m of EBITDA to the business at 31 March 2013. Further, the accounts for JLR Shanghai for the year ending 31 December 2012, showed £346.7m equity at that time. As such, the Trustees submitted that there was "significant propensity" within JLR Shanghai to remit funds to support any claim of the Trustees against the Guarantor.
8. In respect of the JLR Joint Venture, the Trustees noted that a press release of 18 November 2012, demonstrated that £1bn of investment was being made into the JLR Joint Venture by the Guarantor and Chery Automobile Co. Ltd (the joint venture partners). The Trustees submitted that the commitment of such funds demonstrated that an asset of material worth was owned by the Guarantor that did not reside within the Employer.
9. In addition, the Trustees again submitted that JLR Shanghai and the JLR Joint Venture were "outside of" the Employer and so it did not follow that they would be "impaired in a distressed scenario" (that is, the Employer's insolvency). With respect to the PPF's comment that no evidence had been provided relating to the c£400m cash balance of JLR Shanghai or the £1bn worth the JLR Joint Venture, the Trustees enclosed copies of documents which they said should "provide the comfort required". In respect of the PPF's doubts as to the level of insolvency realisations, the Trustees enclosed a copy of a letter from Ernst & Young (the Trustees' covenant advisors) which demonstrated that the Scheme's potential claim under the Guarantee would be c.£150m (being the PPF funding shortfall after asset recoveries from the Employer) and even allowing for a discount to asset values within the assets of the Guarantor the Scheme should be capable of being fully-funded on a PPF basis and thus avoid entry to the PPF.

Reconsideration Committee's decision

10. The Trustees application for reconsideration of the Review Decision was considered by the PPF's Reconsideration Committee. On 11 June 2014, they again upheld the decision not to recognise the Guarantee (the **Reconsideration Decision**).
11. The PPF's Board noted that it had no discretion to depart from the requirements set out in the Determination. The PPF said that the Guarantee was rejected under Rule G2.3, which required the PPF to ask itself whether the Guarantee reduced the risk of the PPF having to pay compensation, and whether the reduction in the levy resulting from the Guarantee was reasonably consistent with the reduction in risk attributable to the Guarantee.
12. With respect to the Trustees' submissions concerning the resources available to the Guarantor from its investments relating to JLR Shanghai the JLR Joint Venture the PPF said:

"13 We considered that, while the investment in the JLR Joint Venture appeared to demonstrate significant capital commitment, the Applicant [Mr Squires] had not provided satisfactory evidence to demonstrate that the investment had substantial value which would be realised by the Guarantor on the insolvency of the Employer.

14 We considered the financial accounts provided for JLR Shanghai as at 31 December 2012. While these accounts stated that JLR Shanghai had total net assets of £1.1billion, the Committee [the Reconsideration Committee] noted that the majority of these assets related to amounts owing to JLR Shanghai, and the extent to which these amounts would be recoverable by JLR Shanghai and remitted to the Guarantor to enable the Guarantor to satisfy the Guarantee was unclear.

15 We noted that the financial accounts for JLR Shanghai did include cash and cash equivalents of £246.7m (excluding £90.5m of cash and cash equivalents which were classified as "restricted funds") in addition to fixed assets of £18.8m. However these amounts, when taken together, fell considerably below the total value of the Guarantee, and it was unclear whether these resources would in practice be available to the Guarantor on demand."

13. The PPF also said that they had considered the Trustees' submissions in light of the letter from Ernst & Young, and the ability of the Guarantor to realise the value of £1.1bn as a creditor of the Employer. In respect of those submissions the PPF said:

"16 ...Based on the information provided, the Committee concluded that it was unclear how much (if any) of this amount could be provided to the Guarantor in the insolvency of the Employer, as the potential impact of the Employer's insolvency on the wider group would have an effect on the potential returns available from the Employer to the Guarantor to satisfy the Guarantee."

14. Finally, the PPF also said that they had considered the Trustees' submission in relation to the remission of funds by JLR Shanghai for a claim on the Guarantor. The PPF said:

“17. ...The Committee [the Reconsideration Committee] noted that no evidence was provided in relation to how the Guarantor would enforce this arrangement in the event that the Employer became insolvent.”

15. Accordingly, the Reconsideration Committee upheld the Review Decision and the original calculation of the levies for the Scheme.

Grounds for Referral

16. The Trustees made a referral to the Pensions Ombudsman Service by completion of an application form on 23 July 2014.
17. Broadly, the Trustees assert that the Guarantor was able to meet its full commitment under the Guarantee on the following grounds:
- the Guarantor has a subsidiary, JLR Shanghai, with assets amounting to approximately £1.1bn as at 31 December 2012, including cash and cash equivalents of £246.7m;
 - the Guarantor would exercise control over JLR Shanghai such that it would take steps to seek remittance of funds to the Guarantor;
 - the Guarantor has an interest in a joint venture company (the JLR Joint Venture) into which the Guarantor and its joint venture partner have invested £1bn;
 - the Guarantor's interest in JLR Shanghai and the JLR Joint Venture would maintain their value notwithstanding the insolvency of the Employer (which is the main trading company in the group); and
 - Ernst & Young advised that in the event of the insolvency of the Employer, the Guarantor would receive a dividend from the Employer in the sum of £1.1bn.
18. In addition, the Trustees have made the following submissions:
- the Trustees took a very thorough and robust approach to certify the Guarantee, which is at odds with the approach taken by the PPF; the PPF have sought to rely only on publicly-available information which, when considering a complex global business, is flawed and inappropriate;

- contrary to paragraph 5.2.28 of the Guidance, the PPF rejected the contingent asset before evidence could be provided by the Trustees;
- the Trustees have not been given a clear explanation as to why the Guarantee was rejected and has thus “impeded the Trustee’s opportunities to demonstrate to the PPF its reasons for being content to certify the Guarantee”;
- the PPF has reached erroneous conclusions with respect to some of the information submitted; and
- the Guarantee does comply with Rule G2.3(2) of the Determination; “the Guarantor entity had assets beyond those of the Employer and, as such, could call on additional resources to settle any guarantee claim, which must by their very existence reduce the risk of compensation being payable from the Board.”. Further, Rule G2.3(2) of the Determination does not require the risk of compensation being payable in the event of the insolvency of an employer is eliminated; no contingent asset guarantees could be capable of reducing risk-based levies to zero and whilst, similarly, the Guarantee doesn’t do this, the assets available to the Guarantor would be such as to reduce the risk of compensation being payable from the PPF in the event of insolvency of the Employer.

19. Further, the Trustees have requested that I convene a meeting or hearing with the Trustees and its representatives in this matter in order to “explore the evidence”.

The PPF’s response to the referral

20. The PPF responded to the referral by letter dated 22 August 2014 and also by letter dated 31 March 2015 (the latter being a response to the Trustees’ further submissions of 26 September 2014).
21. In respect of the Trustees’ assertion that the PPF failed to conduct a thorough due diligence process, the PPF said that during the review and reconsideration processes it considered all of the material put forward by the Trustees. This included reliance on both on information that is publicly available and also on the evidence put forward in respect of the Trustees’ analysis.
22. In respect of the Trustees’ assertion that the PPF gave no clear explanation of the Reconsideration Decision, the PPF said that the reasons for the decision of the PPF to reject the Guarantee were given in the Reconsideration Decision (the Reconsideration Committee finding that the Trustees had not put forward sufficient evidence that the Guarantor would be able to meet its liabilities under the Guarantee in full). Further, the PPF said that if there was further evidence on which the Trustees

wished to rely it was open to the Trustees to put that material forwards for the purposes of the review and reconsideration processes.

23. In respect of the Trustees' request that I convene a meeting or hearing in this matter, the PPF said that there was no need; the Trustees ought to be able to set their case out in full in writing.

24. The PPF raised paragraph 5.4.1 of the Guidance, which says:

"It is intended that Type A guarantees with guarantors unable to meet the submitted value of their guarantee will, in general, be wholly rejected even where the contingent asset may be considered to have some value".

They also raised paragraph 5.3.1 of the Guidance, which says:

"...assessment [i.e. the PPF's assessment] of whether to recognise a contingent asset will, in accordance with Rule G2.3(2) involve comparing the resources of the guarantor (in the event of failure of the employer) with the deemed value of a contingent asset for levy purposes"

The PPF said that in its view the evidence put forward by the Trustees leads to a conclusion that the Guarantor does not have sufficient resources to meet its full commitment under the Guarantee and that, as a result, the reduction in the risk-based pension protection levy would not be consistent with the reduction in risk offered by the Guarantee (in accordance with Rule G2.3(2)). It follows that, in accordance with the Guidance, the Guarantee can in these circumstances be wholly rejected.

25. In accordance with paragraph 5.3.3 of the Guidance, the Trustees were aware that they would be asked to provide "the information which formed the basis of their belief that they could give the Certification in relation to the Guarantor". However, the Trustees failed to provide evidence or confirmation from JLR Shanghai of the detail of the financial support which it could provide to the Guarantor if required. The Trustees also provided no information to establish the assets that would be available from the JLR Joint Venture to the Guarantor in the event of the Employer's insolvency.

Conclusions

26. Before I consider my conclusions on this referral I note that in the comments supporting the Trustees' application form of 24 July 2014, they asked that I consider exercising my discretion to meet with the Trustee and its representatives to "explore the evidence" before a determination is made. (I have highlighted this request in paragraph 19 above.) I do not have discretion to meet with one party to a referral to explore evidence. However, I do have discretion to hold an oral hearing attended by all parties to a referral.

27. The purpose of an oral hearing is to assist me in reaching my determination. Circumstances in which a hearing may be appropriate include where there are differing accounts of a particular material event and the credibility of witnesses needs to be tested; where the honesty and integrity of a party has been questioned and the party concerned has requested a hearing; or where there are disputed material and primary facts which cannot be properly determined from the papers. Given the limited scope of my jurisdiction in these matters (explored further in these conclusions) and the particular material facts of this referral, I do not consider that any of these circumstances apply here so I do not consider it necessary to hold an oral hearing in this case. It follows that I consider that I can properly determine the case on the basis of the detailed written representations and the documentation which has already been submitted by the Trustees and the PPF.
28. With respect to my jurisdiction, I do not have power to 'go behind' the Determination. My jurisdiction is limited to deciding whether the PPF complied with the Determination. Matters of fairness and proportionality are outside of this narrow scope.
29. It follows that deciding whether I prefer the Trustees' or the PPF's view of the Guarantee is not part of my role. I can only interfere with the PPF's decision if it has not been reached correctly. I cannot, therefore, intervene just because I disagree with the substance of the PPF's decision, or would have decided differently myself.
30. The Trustees say that the PPF's refusal to accept all or part of the Guarantee amounts to a failure to comply with the Determination.
31. In accordance with Rules G2.3(1) and (2) of the Determination, for the PPF to accept the Guarantee they must be satisfied that the Guarantee reduces the risk of compensation being payable from the PPF in the event of an insolvency event occurring in respect of the Employer and that such a reduction is reasonably consistent when compared with the level of reduction in risk. The contingent asset was certified by the Trustees on 25 March 2013; in that certification the Trustees said that they had no reason to believe that the Guarantor could not meet its full commitment under the Guarantee. It follows that this is the key question for the PPF to consider when applying the test in Rules G2.3(1) and (2) of the Determination.
32. Rule G2.3(3) of the Determination says that in the event that it does not appear to the PPF that the reduction in a Scheme's levy that may result from the recognition of a Contingent Asset for levy purposes is reasonably consistent when compared with the level of that reduction in risk, they may consider whether to accept it in part. They may consider to accept it in part if they are satisfied that their requirements for a Contingent Asset are otherwise met and it appears to them that Rule G2.3(2) would be satisfied if the Contingent Asset were to be recognised in part. In such

circumstances the PPF may recognise the Contingent Asset to the extent that the PPF deems consistent with the reduction in risk (although there is no obligation for the PPF to take a Contingent Asset into account under Rule G2.3(3)).

33. I am satisfied that the PPF have correctly considered the test set out in Rules G2.3(1) and (2) of the Determination. The PPF have, in their Review Decision (but not, I note, their Reconsideration Decision), also considered whether they should exercise their discretion under Rule G2.3(3) of the Determination to recognise the contingent asset in part. They concluded, in paragraph 12 of the Review Decision, that “given the evidential difficulties in establishing the Board’s satisfaction [as to] the Guarantor’s available assets, the Board was not satisfied that there was an appropriate level at which the contingent asset should be recognised in part”. It follows that the PPF have also correctly considered Rule G2.3(3) of the Determination.
34. The PPF have reached the conclusion that it is not satisfied that the Guarantor could meet its full commitment under the Guarantee on the occurrence of an insolvency event of the Employer. Having considered all of the reasoning provided in reaching that conclusion, I am satisfied that the PPF’s decision was reached correctly. The PPF gave full reasons for its decision - both in the Review Decision and the Reconsideration Decision and subsequently - which were not beyond the bounds of reasonableness. Further, the PPF appears to have carefully considered the evidence provided specifically in light of what is required by the Determination (and having also taken into account the Guidance); by way of example, the Trustees have on various occasions explained how assets would be realised by the Employer in the event of its insolvency and the PPF have correctly recognised that recovery to the Scheme on the insolvency of the Employer is not evidence of the Guarantor’s ability to meet its obligations and, as such, is not a relevant consideration in these circumstances.
35. The Trustees have submitted, in response to my Preliminary Decision, that the Guarantor is only liable under the Guarantee for the Employer’s outstanding liabilities to the Scheme. This means that the Guarantor’s commitments under the Guarantee are only truly determinable after the Employer’s ability to meet its liabilities to the Scheme have been exhausted. The PPF have failed to take into account the amounts which the Employer is able to pay to the Scheme (or which the Employer is able to pay to the Scheme in an insolvency scenario), which is clearly contrary to this principle. (It follows that the Trustees submit that the decision made by the PPF is perverse.) As stated previously, the scope of my jurisdiction is limited to deciding whether the PPF complied with the Determination. The Determination does not provide that the amount guaranteed by the Guarantor is to be subject to - and, effectively, reduced by - the amount (if any) that is recoverable by the Scheme from the Employer. As such, I do not consider that this is a relevant consideration for the purposes of deciding whether the PPF complied with the Determination.

36. The Trustees have also submitted, in their response to my Preliminary Decision, that I should consider “the question of whether the PPF has offered the Trustee a sufficient process of being able to support their certification in relation to the Guarantee in a way which is fair, proportionate and transparent”, or, if consideration of such question is not within my jurisdiction, consider whether the question should be referred to the High Court. My jurisdiction is limited to deciding whether the PPF complied with the Determination. The Trustees’ complaint is a complaint of maladministration. Whilst I am able to consider such complaints, the complaint must first be made to the PPF and then, if it is subsequently necessary, a new complaint brought to my office. Given this position I am therefore unable to consider that complaint in this Determination. Regulation 16 of The Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005, makes it mandatory for me to determine what action the Board should take (and remit the matter to the Board, if necessary). Accordingly, I determine that the decision of the Reconsideration Committee was reached correctly and that it follows that the PPF is not required to take any further action regarding this referral.

Anthony Arter

Pension Protection Fund Ombudsman

29 July 2015