

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

Applicant : Mr R J Griffiths
Scheme : The Turner & Newall Retirement Benefits Scheme (1989)

1. The Pension Protection Fund Ombudsman has received a complaint of maladministration, following a decision by the Reconsideration Committee of the PPF, dated 6 November 2006.

MATTERS FOR INVESTIGATION

2. Mr Griffiths submits:
 - 2.1. The PPF broke its own rules when negotiating for a payment from Federal-Mogul (Turner & Newall Limited's parent company).
 - 2.2. The payment negotiated did not go into the Scheme's funds, so people who transferred out of the Scheme did not benefit. They were deprived of what was rightfully theirs.
 - 2.3. He has suffered injustice because the £250 million settlement negotiated with Federal-Mogul should have increased his transfer value proportionately to the increase in the value of the Scheme's assets. However, because this amount had not been paid into the Scheme, the Independent Trustee would not allow them to be included in the transfer value calculation.
 - 2.4. His transfer value should have been recalculated and re-offered to him and he should have been given the option of transferring at the revised value.
 - 2.5. The PPF hijacked the negotiating powers from the Independent Trustee; thereby preventing him from negotiating a settlement directly beneficial to the Scheme. Instead, they negotiated a deal that only benefited the PPF.

- 2.6. If the Independent Trustee had been involved in the negotiations, the PPF would not have benefited from the settlement agreed.
- 2.7. When the agreement was reached with Federal-Mogul, the Scheme was not in the Assessment Period and, therefore, the power that the PPF Board (the **Board**) has, under Section 137 of the Pensions Act 2004, did not apply.

MATERIAL FACTS

3. The Scheme is a final salary occupational pension scheme. It is currently going through an assessment period for the PPF. This is the period during which the PPF will seek to establish whether the Scheme is suitable for entry into the PPF.
4. Turner & Newell Limited (the Principal Employer) was purchased by Federal-Mogul in 1997. Federal-Mogul went into administration on 1 October 2001. Mr Griffiths latterly worked for Federal-Mogul Friction Products Limited. Federal-Mogul Friction Products Limited withdrew from the Scheme on 16 July 2004, and Mr Griffiths became a deferred member. He was made redundant on 30 March 2007.
5. An Independent Trustee was appointed on 11 October 2001.
6. At the time of the initial insolvency event, the participating employers were enjoying a contributions holiday, because the Scheme's funding level exceeded the Minimum Funding Requirement (**MFR**). Contributions were resumed, in December 2002, with the agreement of the Company Administrator. However, this was only to the extent required to cover benefits accruing after administration had commenced. With effect from December 2002, the accrual rate for benefits under the Scheme was reduced.
7. In March 2003, the Scheme Trustees took the decision to suspend the quotation of transfer values.
8. Between April and August 2004, most of the participating employers withdrew from the Scheme, triggering employer debts under Section 75 of the Pensions Act 1995. As a result, the Company Administrators considered the Scheme to be the largest single creditor.

9. In November 2004, the Pensions Act 2004 was enacted and the PPF was subsequently created. On 10 March 2005, the Pension Protection Fund (Entry Rules) Regulations were made: coming into force in April 2005.
10. The Independent Trustee and the Company Administrators took the view that:
 - 10.1. The Independent Trustee would have no power to vote on a CVA, for which a creditors' meeting had been called, because, as soon as the Administrators submitted a report to the Court and summoned a creditors' meeting, an Assessment Period would begin (under Section 132 of the Pensions Act 2004) and its creditor powers would devolve to the PPF (Section 137).
 - 10.2. If it concluded the negotiations with the Administrators, the Independent Trustee would probably render the Scheme ineligible for PPF compensation.
11. The PPF was approached to become involved in the negotiations.
12. The outcome of the negotiations included:
 - 12.1. Creditors, other than the PPF, signed a settlement, on 26 September 2005, providing for the Independent Trustee to receive £193 million, plus interest at 2% above base rate (worth around £7.5 million), together with pari passu dividends (worth around £40 million).
 - 12.2. Provision for inter-company creditors and present and future claimants in respect of personal injuries caused by exposure to asbestos.
13. In order that the CVA could go ahead, the Administrators needed to be reasonably certain that it would get the necessary support from the creditors. Given that the PPF would be exercising the Trustee's creditor rights, it was approached for a view. Although not a signatory to the settlement, the PPF provided a letter of comfort, dated 26 September 2005, indicating that, subject to certain conditions, it would vote in favour of the CVA.
14. In September 2005, Mr Griffiths was provided with a transfer value statement, quoting a transfer value of £105,141. The notes to the transfer value statement explained,

“The transfer value has been calculated by the Trustee using the procedure set out in Regulation 8 of the Occupational Pension Schemes (Transfer Values) Regulations 1996 (SI 1996/1847), in particular, Regulation 8(4A) and 8(4H), after taking into account the circumstances of the Scheme and the fact that levels of benefit payable will be no more than PPF levels of compensation. Since the Scheme’s assets are not sufficient to provide PPF levels of compensation and at this stage there is no guarantee that the PPF will accept responsibility for the Scheme, the transfer value reflects the level of PPF compensation which it is expected that the Scheme could provide from its own resources. In some cases the normal transfer value calculation method would produce a lower transfer value and in these cases the lower figure is used. However the transfer value equals, or exceeds, the amount required to be paid in accordance with the legislation regarding the Minimum Funding Requirement.

If the Scheme’s current special circumstances had not existed and its funding level would have permitted the payment of unreduced transfer values, your transfer value would have been £166,375.00.

The Trustee will review the level of reduction from time to time. This depends on the future performance of the Scheme’s investments, and other factors that affect Scheme funding levels. These factors cannot be predicted in advance, however, it seems unlikely that the reduction in transfer values currently in place will be removed.”

15. Following news of the creditors’ agreement, Mr Griffiths asked for his transfer value to be recalculated taking the £250 million into account. The Independent Trustee responded by saying that it could not include the £250 million in transfer value calculations until it had actually been received. It acknowledged that this was likely to be after the deadline for transfer payments.
16. On 10 July 2006, the Company Administrators submitted a report to the Court, under Section 2 of the Insolvency Act 1986, stating that a creditors’ meeting should be summoned. This was an insolvency event for the purposes of Section 126 of the Pensions Act 2004 and, because the Scheme was an eligible scheme, the Assessment Period was triggered.
17. The CVA was approved by the creditors at a meeting, on 7 September 2006, at which the Trustee’s creditor’s rights were exercised by the PPF.
18. The Independent Trustee received the sum of £200,825.753.42, on 12 October 2006. Other sums were to be paid as and when they fell due under the agreement.

RECONSIDERATION DECISION

19. The Reconsideration Committee decided:
- 19.1. It was satisfied that the Board acted entirely properly and was carrying out its statutory functions in negotiating with Federal-Mogul.
 - 19.2. At the time Mr Griffiths requested a transfer value, the company voluntary arrangement (CVA) had not been formally proposed. Accordingly, any decision, at that stage, in relation to transfer values was entirely a matter for the Scheme Trustee. Therefore, there was no act or omission on the part of the Board which could amount to maladministration.
 - 19.3. Once a scheme has entered an assessment period, trustees are only permitted to pay transfer values in certain limited circumstances, which are set out in Regulation 16 of the Pension Protection Fund (Entry Rules) Regulations 2005 (the **Entry Rules**) (see Appendix).
 - 19.4. The cash payment negotiated with Federal-Mogul was to be paid to the Scheme Trustees for the benefit of the Scheme; not to the Board. Section 137(3) of the Pensions Act 2004 (see Appendix) specifically requires the Board to pass on, to the trustees or managers of a scheme, any amounts paid to the Board in respect of employer debt during an assessment period. The Board cannot benefit from such payments during an assessment period.
 - 19.5. The Independent Trustee had not been excluded from the negotiations. If the trustees of a scheme enter into a compromise deal, the effect of which is to reduce the amount potentially recoverable against the scheme employer(s), they will make the scheme ineligible for entry into the PPF (Regulation 2(2) of the Entry Rules). The Independent Trustee, therefore, chose not to enter into a deal with Federal-Mogul itself, because to do so would have risked disqualifying the Scheme from entry into the PPF.
 - 19.6. The Independent Trustee was, however, closely involved in, and kept informed of, the negotiations and was not excluded. The final deal was entered into by the Board, because a compromise by the Board does not render the Scheme ineligible for the PPF. An e-mail from the Independent

Trustee, dated 7 November 2005, to Mr Griffiths, indicated that the Independent Trustee was satisfied that the deal was as good as was available.

- 19.7. Once an assessment period has commenced in relation to any scheme, the Board, by law, takes over the rights and powers of the trustees in relation to employer debt (Section 137, the Pensions Act 2004). Any amounts recovered are paid to the trustees for the scheme. The Board will exercise the creditor's rights in all circumstances with a view to maximising the assets of the scheme. This is the case whether the scheme ultimately transfers to the PPF or not.

WRITTEN REPRESENTATIONS

20. The PPFO has received written representations from both the PPF and Mr Griffiths. These are summarised below.

The PPF

21. The PPF submits:
- 21.1. The Insolvency Act 1986 (as amended) was intended to offer the prospect of a rescue for financially troubled companies. It is not uncommon for there to be negotiations between the major creditors and the insolvency practitioners regarding a CVA before it is formally put to a meeting of creditors. The agreement of 75% of the creditors is required for a CVA proposal to be accepted. If a proposal is rejected, the damage to the company can be irreparable.
- 21.2. In many cases, recovery made under a CVA is beneficial for all creditors, including the pension scheme. Such a proposal can offer a better, and sometimes a more certain, return than might otherwise be achieved.
- 21.3. Each creditor has to undertake a balancing exercise: comparing the outcome offered by the CVA against the uncertain outcome of a liquidation.
- 21.4. Section 137 of the Pensions Act 2004 (see Appendix) provides for the Board to act as a creditor during an assessment period.

- 21.5. Where the pension scheme is a major creditor, it is imperative that the PPF be involved in negotiations concerning a CVA. By the time of the creditors' meeting, it is the PPF which exercises the trustee's right to vote on the CVA, and it can reject a proposal if it considers that it does not represent the best chance of recovery for the pension scheme.
- 21.6. Trustees are likely to decline to enter into any agreement which would render the pension scheme ineligible for entry into the PPF.
- 21.7. Administrators, therefore, have little reason to negotiate with the trustees of a pension scheme in the matter of a CVA.
- 21.8. The letter from the Board, dated 26 September 2005, to the Company Administrators was written before the Trustee's rights as creditor had devolved to it. That is, however, intrinsic to the situation. The letter represents an assurance by the Board as to how it would exercise creditor's rights if and when it was in a position to do so. If the Board never came to be able to exercise the creditor's rights, the letter would simply not have effect.
- 21.9. The Board is satisfied that it may properly give advance assurance as to how it would exercise such rights. Its willingness to do so is necessary for the orderly conduct of a matter such as the present case.
- 21.10. The Independent Trustee was not excluded from the negotiations. It was kept informed and its views were sought by the Board.
- 21.11. The Independent Trustee's adviser commented on the draft CVA document before it was filed in Court and also filed a witness statement in Court.
- 21.12. The Independent Trustee was sent a warning notice under Section 96(2)(a), as a directly affected party, in relation to the clearance application to the Pensions Regulator. This notice provides information on the application and an opportunity to object to the clearance. The settlement agreement was specifically mentioned in the notice. The Independent Trustee raised no objection to the clearance, which was duly granted by the Pensions Regulator.
- 21.13. Given the risk of rendering the Scheme ineligible for the PPF, the Independent Trustee was reluctant to enter into any agreement with the Company

Administrators which might have the effect of accepting a lower amount than the full debt due under Section 75.

- 21.14. The Independent Trustee was satisfied that the CVA was as good a deal as was available.
- 21.15. The Board obtained information from the Company Administrators and the Independent Trustee, together with advice from its own insolvency adviser.
- 21.16. The Board concluded that, on balance, the proposed CVA was likely to be better for the Scheme than the alternative of liquidation, regardless of whether or not it entered into the PPF. It therefore supported the CVA and provided the letter of comfort for the Company Administrators.
- 21.17. In any event, Section 137(3) requires any recoveries to be paid to the Independent Trustee, not to the Board.
- 21.18. Even if there was a difference of opinion as to whether the CVA represented the best deal for the Scheme, this would not be the basis for a finding of maladministration on the part of the Board. The Board went through due process before deciding to issue its letter of comfort and support the CVA.
- 21.19. The monies recovered under the CVA and paid into the Scheme do potentially benefit the members. If the Scheme does not, ultimately, enter the PPF, there will be no transfer of assets or liabilities to the PPF. The payments made under the CVA will increase the amount in the Scheme for the benefit of the members. If the Scheme does enter the PPF, the members will benefit from the compensation provided by the PPF.
- 21.20. The level of recovery under the CVA would make no difference to the level of compensation received by the members in the PPF. To that extent, the level of recovery is of more importance to the Board than the Independent Trustee because the PPF seeks to maximise the scheme's recovery in the insolvency in order to minimise the burden on levy payers of funding the PPF. In almost all cases, the cost of a scheme's entry into the PPF is more than the value of its assets. Therefore, the PPF would have little financial incentive to seek the entry of a scheme into the PPF.

- 21.21. At the time it was involved in the negotiations, the Board did not know what the level of Scheme funding was and, therefore, could not know how likely it was to enter the PPF.
- 21.22. The alternative to the CVA was liquidation, which would also have triggered the Assessment Period.
- 21.23. The Board's motive for agreeing to the CVA could not have been to get the Scheme into the PPF.
- 21.24. Decisions in respect of transfer values were a matter for the Independent Trustee. The Board had no involvement in either of Mr Griffiths' requests for a transfer value.
- 21.25. It is not surprising that the Independent Trustee was not prepared to take into account the payment to be made under the CVA. The payment was conditional on future events and circumstances and was not made to the Scheme until after the date on which the transfer value was calculated. The Independent Trustee would also not have known whether the Scheme was eligible for entry into the PPF. Had it allowed Mr Griffiths' transfer value to be calculated on that basis, it risked allowing him to transfer out more than an appropriate share of the Scheme's assets.
- 21.26. The Independent Trustee's powers in relation to transfer values during the Assessment Period are circumscribed by Section 135(4)(a) (see Appendix). Transfer values may only be paid in the circumstances provided for in Regulation 16 of the Entry Rules (see Appendix).
- 21.27. The effect of Regulation 16 is that, unless Mr Griffiths had accepted a transfer value and notified the Independent Trustee of a scheme willing to accept it prior to the start of the Assessment Period, the Independent Trustee could not pay it. Even if those conditions were met, the Independent Trustee could only pay the transfer value if it was satisfied that to do so was consistent with minimising the deficit in the Scheme's assets. It would also have been required to reduce the transfer value to the extent necessary to ensure that it did not exceed the cost of securing benefits equivalent to the potential compensation payable by the PPF.

21.28. The calculation of Mr Griffiths' transfer value after commencement of the Assessment Period was determined by the applicable legislation and not by any act or omission on the part of the Board.

Mr Griffiths

22. Mr Griffiths submits:

22.1. There was collusion between the PPF and the Independent Trustee to get the Scheme into the PPF. There is a lot of money in the Scheme and the PPF needs this in order to survive.

22.2. The deal with Federal-Mogul was in the PPF's interests and not the Scheme members'. The Independent Trustee was prevented from attending the final negotiations with Federal-Mogul and, therefore, could not look after the interests of the members.

22.3. The Scheme had run for more than 16 years with no support from the company, except in name. It had survived ups and downs in the Stock Market, including "Black Monday" in 1987, and was still functioning fully as intended.

22.4. The PPF claims that it will be to its financial disadvantage to take on the Scheme. The figures showing that the Scheme is under-funded are based on having to buy annuities for all the members, which is an expensive way to provide the benefits. If the Scheme enters the PPF, this will not happen. The Scheme will be run as a closed scheme, with the PPF paying "benefits" to members at reduced levels. The PPF will gain much needed funds from the Scheme's assets. This is why it is so desperate for the Scheme to enter the PPF and why the collusion took place. This has resulted in the reduction of his transfer value and pension.

22.5. The premature involvement of the PPF in the negotiations with Federal-Mogul and the disqualification of the Independent Trustee from those negotiations ensured that this would be the result.

- 22.6. Section 137(2) of the Pensions Act 2004 applies during the Assessment Period, which did not start until the CVA was formalised, on 10 July 2006. This part of the Act could not apply until after that date.
- 22.7. The PPF had indicated, in its letter of September 2005, that the terms of the CVA were acceptable. The Independent Trustee should have had no problem with attending the meeting. The PPF, however, has said that this would have prevented the Scheme from entering the PPF if it had done so.
- 22.8. The PPF was determined that the Independent Trustee would not be involved. This was to enable it to serve its own ends, to the detriment of the Scheme members.
- 22.9. It is not a level playing field if the ability of the Scheme to pay benefits is judged on its ability to buy annuities, but the PPF does not have to follow that course of action. The Scheme was able to pay full benefits until the Independent Trustee and the PPF were involved. Because of the low level set for the MFR, very few successful schemes would be able to buy annuities to provide members with full benefits (or even the 90% promised by the PPF). It is a grossly unfair yardstick by which to measure a scheme's viability, but it would be fairer if the PPF paid compensation based on the Scheme's capabilities once it had taken over its assets.

Further Response by the PPF

23. The PPF make the following further points:
- 23.1. Whether the Scheme was functioning fully as intended, bearing in mind its significant deficit and the insolvency of the employers, cannot be certain.
- 23.2. The Scheme's ability to pay benefits as they fall due at any point in time is by no means an indicator that it would be able to satisfy its ongoing obligations in future years; there was a significant deficit and no ongoing sponsoring employer.
- 23.3. Mr Griffiths is correct insofar as the PPF will simply pay compensation as it falls due and will not have to buy annuities. This is a consequence of the

statutory framework and is not a matter over which the Board has any control. However, the Board had no incentive to ensure that the Scheme entered the PPF and to suggest that it was “desperate” for this to happen is “absurd”.

- 23.4. Mr Griffiths is incorrect to suggest that, following transfer to the PPF, the Scheme will run as a closed scheme under the Board’s jurisdiction. If the Board assumes responsibility for the Scheme, then the Scheme will cease to exist. Instead, the Board will have a responsibility to pay compensation.
- 23.5. If the Scheme has sufficient assets to wind up outside the PPF and secure the same level of benefits, but the Trustees are unable to obtain a full buy-out to achieve this, the Scheme could continue to run as a closed scheme outside the PPF, managed by the Trustees.
- 23.6. Certain provisions apply to closed schemes as if they were in an assessment period, but Section 138 (which contains the key restriction on payment of benefits) does not apply. The Trustees would not be obliged to limit benefits to PPF compensation levels, as they are whilst in the Assessment Period.
- 23.7. When running as a closed scheme, the Scheme would not be under the Board’s jurisdiction, any more than it is whilst in the Assessment Period.
- 23.8. All the restrictions which apply to the Scheme, are provided for in the Pensions Act 2004 and regulations made under that Act.
- 23.9. Whilst a scheme runs as a closed scheme, it must continue to undertake actuarial valuations in accordance with statutory requirements. If at any time the trustees become aware that the value of a scheme’s assets is less than the amount required to wind up, outside the PPF, and provide benefits at least equivalent to PPF compensation levels, they must make an application to the Board for it to assume responsibility for the scheme. The Board will then undertake a valuation to confirm whether the scheme’s assets are insufficient on that basis and, if so, will assume responsibility for the scheme.
- 23.10. The Board has no power to pay benefits based on the Scheme’s capabilities following transfer to the PPF. Once transfer has occurred, a scheme ceases to

exist and the Board assumes responsibility for paying the levels of compensation set out in Schedule 7 to the Pensions Act 2004.

CONCLUSIONS

24. Mr Griffiths' complaint centres around action taken by the Board in relation to negotiations between the Company Administrators and Federal-Mogul's creditors. He takes the view that the Board should not have become involved because Section 137 had not been triggered.
25. I agree with Mr Griffiths, that Section 137 had not been triggered, because the Assessment Period had not commenced. However, in view of the circumstances, I can see nothing wrong with the Board being willing to indicate how it might vote at a creditors' meeting, should one be called. As the PPF has pointed out, had the meeting not been called (and, hence, the insolvency event had not occurred), the Assessment Period would not have commenced and the Board would not have been called upon to vote; its letter would simply have been of no value.
26. Mr Griffiths clearly feels that the interests of the Scheme members and the interests of the PPF are in this situation divergent. I do not believe this to be the case. It is in both the interests of the Scheme members and the PPF that any settlement maximises the amount payable to the Scheme. In the case of the Scheme members, so that the chances of them receiving nearer to their expected benefits without PPF intervention are maximised and, in the case of the PPF, so that it maximises the scheme assets it takes on should it have to assume responsibility for compensating the Scheme members. I am not persuaded, therefore, that it would have made any noticeable difference to the outcome for the Scheme had it been the Independent Trustee or the PPF which had been latterly involved in the negotiations with the Company Administrator.
27. The bare bones of the situation are that the Scheme is winding up and there are insufficient assets to provide for the members' accrued benefits. Mr Griffiths argues that this was not the case before the PPF became involved. He is overlooking the actuarial valuations, which indicated that the Scheme was considerably less than 100% funded on a buy-out basis. I note Mr Griffiths' argument that this situation only

arises because the Scheme is being measured on its ability to purchase annuities for the members. It is indeed the case that a final salary scheme, which may be able to provide for benefits as and when they fall due in the ordinary course of events, is likely to struggle to provide for all the members' accrued benefits if called upon to secure them all at any one time. Most schemes are not fully funded on this basis.

28. However, if a scheme is being wound up, its trustees must take steps to secure its members' accrued benefits somehow, since it will cease to exist once winding up is completed. Unless its members are transferring to other schemes, this has to be by purchase of an annuity of some sort. Regardless of what Mr Griffiths thinks of the fairness of such a measure, this is what is required by the Scheme's own trust provisions and the surrounding legislation.
29. The PPF, on the other hand, is not an occupational pension scheme. Its function is to pay compensation, in certain circumstances, where an occupational pension scheme has been wound up and its trustees/managers were unable to secure the accrued benefits. Because the PPF is intended to have ongoing involvement, the legislation does not require it to purchase annuities. The compensation can be paid on an ongoing basis out of the PPF's resources. Those resources include funds from schemes taken into the PPF, whose members go on to receive PPF compensation, together with funds raised through levies raised on ongoing schemes.
30. If it transpires that the Scheme Trustees are able to wind it up and secure benefits at least equivalent to the compensation levels offered by the PPF, the Scheme will not enter the PPF. It follows that, if a scheme enters the PPF, it must be because its own assets cannot provide benefits equal to or greater than the compensation provided by the PPF. There is unlikely to be a financial advantage to the PPF in this, because in the normal course of events it then becomes responsible for providing compensation in excess of the benefits which could be secured by the assets it has acquired. I believe that many of Mr Griffiths' misgivings about the role of the PPF are based on a misconception of the actual funding position of the Scheme. If the Scheme is able to provide for its members' accrued benefits, it will not qualify for the PPF. Indeed, if it can provide benefits equal to or greater than the compensation offered by the PPF, it will not enter the PPF. It is only if it is likely to provide less than the PPF, that the Scheme will be assessed and possibly accepted. If this happens, the Scheme, itself,

will cease to exist. The members, including Mr Griffiths, would then benefit from the higher levels of PPF compensation.

31. The Independent Trustee, quite rightly, did not want to jeopardise the members' chances of benefiting from the PPF (should the need arise). It was for this reason that it stepped away from negotiations with the Company Administrators. However, it is the legislation that provides for a scheme to lose its eligibility (for the PPF) if the trustees compromise the employer debt. It was not any action on the part of the Board that discouraged the Independent Trustee from continuing with the negotiations.
32. Mr Griffiths' concerns may also have been increased by the refusal, on the part of the Independent Trustee, to re-calculate his transfer value to take into account the sums due to the Scheme under the creditors' agreement. This is not a decision taken by the Board. Therefore, even if I were to find that such action amounted to maladministration, it cannot be maladministration on the part of the Board. Having said that, the actions of the Independent Trustee are constrained by its responsibility to the members of the Scheme and the provisions of the relevant legislation. I am not persuaded that it was maladministration to decline to recalculate Mr Griffiths' transfer value to take account of funds which had been negotiated for the Scheme, but not yet paid to it. To do so would not have been acting in the best interests of the other members of the Scheme. It seems, however, to have planted, in Mr Griffiths' mind, the idea that the promised funds have gone to the PPF rather than to the Scheme. This is not the case. The PPF will not acquire any of the Scheme's assets unless and until its viability has been assessed and the Scheme ceases to exist because it has entered the PPF.
33. Whilst I sympathise with Mr Griffiths, in the situation in which he finds himself, I find no maladministration on the part of the Board and I do not uphold his complaint.

CHARLIE GORDON
Deputy Pension Protection Fund Ombudsman

31 March 2008

APPENDIX

The Pensions Act 2004

“126 Eligible schemes

(1) Subject to the following provisions of this section, in this Part references to an “eligible scheme” are to an occupational pension scheme which—

(a) is not a money purchase scheme, and

(b) is not a prescribed scheme or a scheme of a prescribed description.

(2) A scheme is not an eligible scheme if it is being wound up immediately before the day appointed by the Secretary of State by order for the purposes of this subsection.

(3) Regulations may provide that where—

(a) an assessment period begins in relation to an eligible scheme (see section 132), and

(b) after the beginning of that period, the scheme ceases to be an eligible scheme,

the scheme is, in such circumstances as may be prescribed, to be treated as remaining an eligible scheme for the purposes of such of the provisions mentioned in subsection (4) as may be prescribed.

(4) Those provisions are—

(a) any provision of this Part, and

(b) any other provision of this Act in which “eligible scheme” has the meaning given by this section.

(5) Regulations may also provide that a scheme which would be an eligible scheme in the absence of this subsection is not an eligible scheme in such circumstances as may be prescribed.”

“132 Assessment periods

(1) In this Part references to an assessment period are to be construed in accordance with this section.

(2) Where, in relation to an eligible scheme, a qualifying insolvency event occurs in relation to the employer, an assessment period—

(a) begins with the occurrence of that event, and

(b) ends when—

(i) the Board ceases to be involved with the scheme (see section 149),

(ii) the trustees or managers of the scheme receive a transfer notice under section 160, or

(iii) the conditions in section 154(2) (no scheme rescue but sufficient assets to meet protected liabilities etc) are satisfied in relation to the scheme,

whichever first occurs.

(3) In subsection (2) “qualifying insolvency event” has the meaning given by section 127(3).

(4) Where, in relation to an eligible scheme, an application is made under section 129(1) or a notification is received under section 129(5)(a), an assessment period—

(a) begins when the application is made or the notification is received, and

(b) ends when—

(i) the Board ceases to be involved with the scheme (see section 149),

(ii) the trustees or managers of the scheme receive a transfer notice under section 160, or

(iii) the conditions in section 154(2) (no scheme rescue but sufficient assets to meet protected liabilities etc) are satisfied in relation to the scheme,

whichever first occurs.

(5) For the purposes of subsection (4) an application under section 129(1) or notification under section 129(5)(a) is to be disregarded if it is made or given during an assessment period in relation to the scheme which began before the application was made or notification was given.

(6) This section is subject to section 159 (which provides for further assessment periods to begin in certain circumstances where schemes are required to wind up or continue winding up under section 154).”

“135 Restrictions on winding up, discharge of liabilities etc

(1) This section applies where there is an assessment period in relation to an eligible scheme.

(2) Subject to subsection (3), the winding up of the scheme must not begin during the assessment period.

(3) Subsection (2) does not apply to the winding up of the scheme in pursuance of an order by the Regulator under section 11(3A) of the Pensions Act 1995 (Regulator’s powers to wind up occupational pension schemes to protect Pension Protection Fund) directing the scheme to be wound up (and section 219 makes provision for the backdating of the winding up).

(4) During the assessment period, except in prescribed circumstances and subject to prescribed conditions—

(a) no transfers of, or transfer payments in respect of, any member’s rights under the scheme rules are to be made from the scheme, and

(b) no other steps may be taken to discharge any liability of the scheme to or in respect of a member of the scheme in respect of—

(i) pensions or other benefits, or

(ii) such other liabilities as may be prescribed.

(5) Subsection (4)—

(a) is subject to section 138, and

(b) applies whether or not the scheme was being wound up immediately before the assessment period or began winding up by virtue of subsection (3).

...”

“137 Board to act as creditor of the employer

(1) Subsection (2) applies where there is an assessment period in relation to an eligible scheme.

(2) During the assessment period, the rights and powers of the trustees or managers of the scheme in relation to any debt (including any contingent debt) due to them by the employer, whether by virtue of section 75 of the Pensions Act 1995 (c. 26) (deficiencies in the scheme assets) or otherwise, are exercisable by the Board to the exclusion of the trustees or managers.

(3) Where, by virtue of subsection (2), any amount is paid to the Board in respect of such a debt, the Board must pay that amount to the trustees or managers of the scheme.”

“138 Payment of scheme benefits

(1) Subsections (2) and (3) apply where there is an assessment period in relation to an eligible scheme.

(2) The benefits payable to or in respect of any member under the scheme rules during the assessment period must be reduced to the extent necessary to ensure that they do not exceed the compensation which would be payable to or in respect of the member in accordance with this Chapter if—

(a) the Board assumed responsibility for the scheme in accordance with this Chapter, and

(b) the assessment date referred to in Schedule 7 were the date on which the assessment period began.

(3) But where, on the commencement of the assessment period—

(a) a member’s pensionable service terminates, and

(b) he becomes a person to whom Chapter 5 of Part 4 of the Pension Schemes Act 1993 (c. 48) (early leavers: cash transfer sums and contribution refunds) applies,

no benefits are payable to or in respect of him under the scheme during the assessment period.

(4) Section 150(5) (retrospective accrual of benefits in certain circumstances) is to be disregarded for the purposes of determining whether a member falls within paragraph (a) or (b) of subsection (3).

(5) Nothing in subsection (3) prevents the payment of benefits attributable (directly or indirectly) to a pension credit, during the assessment period, in accordance with subsection (2).

(6) Where at any time during the assessment period the scheme is being wound up, subject to any reduction required under subsection (2) and to subsection (3), the benefits payable to or in respect of any member under the scheme rules during that period are the benefits that would have been so payable in the absence of the winding up of the scheme.

(7) Subsections (2), (3) and (6) are subject to sections 150(1) to (3) and 154(13) (which provide for the adjustment of amounts paid during an assessment period when that period ends other than as a result of the Board assuming responsibility for the scheme).

(8) For the purposes of subsections (2) and (3) the trustees or managers of the scheme may take such steps as they consider appropriate (including steps adjusting future payments under the scheme rules) to recover any overpayment or pay any shortfall.

(9) Section 10 of the Pensions Act 1995 (c.26) (civil penalties) applies to a trustee or manager of a scheme who fails to take all reasonable steps to secure compliance with subsections (2) and (3).

(10) Regulations may provide that, where there is an assessment period in relation to an eligible scheme—

(a) in such circumstances as may be prescribed subsection (2) does not operate to require the reduction of benefits payable to or in respect of any member;

(b) the commencement of a member's pension or payment of a member's lump sum or other benefits is, in such circumstances and on such terms and conditions as may be prescribed, to be postponed for the whole or any part of the assessment period for which he continues in employment after attaining normal pension age.

(11) For the purposes of subsection (10)—

(a) "normal pension age", in relation to an eligible scheme and any pension or other benefit under it, means the age specified in the scheme rules as the earliest age at which the pension or other benefit becomes payable without actuarial adjustment (disregarding any scheme rule making special provision as to early payment on the grounds of ill health), and

(b) where different ages are so specified in relation to different parts of a pension or other benefit—

(i) subsection (10) has effect as if those parts were separate pensions or, as the case may be, benefits, and

(ii) in relation to a part of a pension or other benefit, the reference in that subsection to normal pension age is to be read as a reference to the age specified in the scheme rules as the earliest age at which that part becomes so payable.

(12) Regulations may provide that, in prescribed circumstances, where—

(a) a member of the scheme died before the commencement of the assessment period, and

(b) during the assessment period, a person becomes entitled under the scheme rules to a benefit of a prescribed description in respect of the member,

the benefit, or any part of it, is, for the purposes of subsection (2), to be treated as having become payable before the commencement of the assessment period.

(13) Nothing in subsection (2) or (3) applies to money purchase benefits.”

The Pension Protection Fund (Entry Rules) Regulations 2005 (SI 2005/590)

“Schemes which are not eligible schemes

2. - (1) For the purposes of section 126(1)(b) of the Act (eligible schemes), an occupational pension scheme is not an eligible scheme if it is ...

(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.

(3) Paragraph (2) shall not apply where -

(a) before the beginning of an assessment period -

(i) 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 the debt due to the scheme from that employer under section 75(2) of the 1995 Act which may be recovered by, or on behalf of, those trustees or managers;

(ii) the value of the scheme's assets would be sufficient to secure benefits for or in respect of members of the scheme which correspond to the amount of compensation which would be payable in relation to the scheme in accordance with the pension compensation provisions if the Board were to assume responsibility for the scheme in accordance with Chapter 3 of Part 2 of the Act (pension protection);

(iii) an individual appointed to act as the actuary in relation to the scheme ("the actuary") has provided the Board with a written estimate of the current value of the assets and the protected liabilities of the scheme together with a statement about the effect which the agreement would have on the value of the scheme's assets as recorded in that estimate; and

(iv) the Board has determined to validate the estimate and statement provided;

(b) before the beginning of an assessment period, the trustees or managers of the scheme enter into a legally enforceable agreement with an employer in relation to the scheme, as part of an arrangement under section 425 of the Companies Act 1985 (power of company to compromise with creditors or members), the effect of which is to reduce the amount of the debt due to the scheme from that employer under section 75(2) of the 1995 Act which may be recovered by, or on behalf of, those trustees or managers; or

(c) after the beginning of an assessment period, or a further assessment period, the Board is acting as creditor of an employer in relation to the scheme under section 137 of the Act (Board to act as creditor of the employer) and has entered into a legally enforceable agreement with that employer on behalf of the trustees or managers of the scheme the effect of which is to reduce the amount of the debt due to the scheme from that employer under section 75(4) of the 1995 Act which may be recovered by, or on behalf of, those trustees or managers.

(4) Paragraph (2) above shall also not apply in relation to an eligible scheme where, before the beginning of an assessment period in relation to the scheme, a prescribed arrangement is in place pursuant to regulations made under section 75A of the 1995 Act (debt due from the employer in the case of multi-employer schemes).

(5) Where the Board has determined to validate or not to validate an estimate and statement provided to it by the actuary under paragraph (3)(a)(iii), it must issue a notice to this effect (“a validation notice”) and must give a copy of that notice to -

- (a) the trustees or managers of the scheme,
- (b) the actuary,
- (c) the insolvency practitioner in relation to the employer in relation to the scheme, and
- (d) the Regulator.”

“Restrictions on winding up, discharge of liabilities etc

16. - (1) Subject to subsection (2) below, the prescribed circumstances in which -

(a) a transfer or transfer payment in respect of a member's rights under the scheme rules may be made by the trustees or managers of the scheme are where a member has, before the beginning of an assessment period in relation to the scheme -

(i) been provided with a written statement of entitlement of the amount of the cash equivalent at the guarantee date of any benefits which have accrued to or in respect of him under the applicable rules pursuant to an application made by that member under section 93A(1) of the 1993 Act (salary related schemes: right to a statement of entitlement);

(ii) acquired a right to a guaranteed cash equivalent by virtue of section 94(1)(a) of the 1993 Act (right to a cash equivalent); and

(iii) made an application under section 95 of the 1993 Act (ways of taking right to cash equivalent) requiring the trustees or managers of the scheme to use the cash equivalent to which he has acquired a right in whichever of the ways specified in subsection (2) of that section and has not withdrawn that application; and

(b) other steps may be taken by the trustees or managers of the scheme to discharge any liability of the scheme to or in respect of a member of the scheme in respect of -

(i) a pension or other benefit (except an ill health pension); and

(ii) a refund of contributions,

are where the member became entitled to the pension or benefit or to the refund of contributions before the beginning of an assessment period in relation to the scheme.

(2) A transfer or transfer payment in respect of a member's rights under a scheme or a refund of a member's contributions to a scheme shall not be made unless the trustees or managers of the scheme -

(a) are satisfied that to do so is consistent with the objective of ensuring that the scheme's protected liabilities do not exceed its assets or, if they do exceed its assets, that the excess is kept to a minimum; and

(b) reduce the amount of the transfer or transfer payment or the refund of contributions by the extent necessary to ensure that it does not exceed the cost of securing benefits for and in respect of members of the scheme which correspond to the compensation that would be payable, in relation to the scheme, in accordance with the pension compensation provisions if the Board were to assume responsibility for the scheme in accordance with Chapter 3 of Part 2 of the Act.

(3) For the purposes of this regulation, a member is entitled to -

(a) a pension or other benefit where he has reached normal pension age; and

(b) a refund of contributions when he has -

(i) requested and received a quotation from the trustees or managers of the scheme showing the amount of the contributions which may be refunded in respect of his accrued rights to benefits under the scheme, and

(ii) notified the trustees or managers of the scheme in writing of his agreement to accept a refund of contributions on the basis of the quotation.

(4) In this regulation -

“the guarantee date” has the meaning given in section 93A(2) of the 1993 Act; and

“the applicable rules” has the meaning given in section 94(2) of the 1993 Act.”