

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

Applicant	: Mr D Waters
PPF	: Pension Protection Fund
Board	: The Board of the Pension Protection Fund (the Board)
OPS	: Scottish and Grampian Pension Scheme (the Scheme)
Reconsideration Committee	: The Board's Reconsideration Committee (the Committee)
Reconsideration Decision	: The Board's calculation of the pension protection levies for the Scheme in respect of the period 1 April 2006-31 March 2007, as set out in the invoice dated 6 October 2006.

1. The Pension Protection Fund (PPF) Ombudsman has received a referral of a reviewable matter, following a decision by the Committee of the PPF dated 26 February 2007.

RECONSIDERATION DECISION

2. Mr Waters, a Trustee of the Scheme, requested the Committee to reconsider the PPF Board's calculation of the pension protection levy for the Scheme, in respect of the period 2006/2007, as set out in the invoice to the Trustees of the Scheme (the **Trustees**), dated 6 October 2006. This calculation is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004 (the **Act**).

APPLICANT'S GROUNDS FOR REFERRAL

3. Mr Waters, in his capacity as a Trustee of the Scheme, referred his complaint to me on the grounds that:
 - (i) The information on which the Board calculated the Scheme levy is factually incorrect and does not take into account the value of an insurance policy which was an asset of the Scheme as at 31 March 2006.
 - (ii) The insurance policy is a substantial asset of the Scheme and its exclusion from the levy calculation, materially affects the amount of the levy. The Scheme actuary estimates that the risk based levy would be £2,624 with the insurance policy taken into account, rather than £130,541.

- (iii) The insurance policy was not reflected in the levy calculation because that calculation was based on the latest minimum funding review (MFR) valuation which did not take into account the value of the insurance policy. A valuation in accordance with section 179 of the Act (a section 179 valuation), taking into account the value of the policy, and reflecting the value of the assets of the Scheme as at 31 March 2006, was submitted to the Board on 3 April 2006. However, the Board declined to use the section 179 valuation, or take into account information contained in that valuation of the Scheme's assets as at 31 March 2006, on the basis that the valuation was received after the deadline for receipt of 31 March 2006.
- (iv) Whilst it is accepted that the Board determined that any information to be provided to the Board by a certain date (including any Section 179 valuation) should be provided by 31 March 2006, at paragraph 6 of the Determination, the Board also states that *"Nothing in the Board's determination or this Schedule shall prevent the Board from reviewing the amount of the levies calculated in respect of a scheme where it subsequently appears to the Board that the information upon which the calculation was based was incorrect in a material respect...."*. The Trustees consider that the Board has the power to, and should, review the amount of the levy calculation in order to take into account the correct asset position of the Scheme as at the calculation date.
- (v) In the Trustees' view, the Board's failure to take into account the information as to the Scheme's asset position as at 31 March 2006, means that the levy calculation is inconsistent with the following:
 1. The statutory objective set out in section 175(2) of the Act, that the levy should be assessed by reference to *"the difference between the value of the scheme's assets...and the amount of its protected liabilities"*;
 2. The Board's objective, as set out at paragraph (2) of its Determination under Section 175(2) of the Act that *"all the matters referred to in this Schedule (relating to the calculation of the levies) shall be assessed, measured or quantified in accordance with the factual position as it existed at 31 March 2006"*;
 3. The Board's intention as set out at paragraph 1.3 of the document entitled *"Methodology for adapting MFR valuations to estimate*

liabilities on a section 179 basis for the purpose of estimating the pension protection levy”, to “undertake the risk based levy calculations using underfunding risk on a consistent (section 179) basis for all schemes”; and

4. The Board’s intention, in creating the model for converting the information in MFR valuations into valuations on a section 179 basis, to meet the objective referred to at 3 above.

MATERIAL FACTS

4. The Scheme is an eligible scheme, in respect of which levies are payable to the PPF. Section 175(1) of the Act requires the Board to impose, in respect of the financial year 2006/2007, both a risk based pension protection levy, and a scheme based pension protection levy, in respect of all eligible schemes.
5. The Board’s statutory duty is to calculate the levies payable in respect of an eligible scheme in accordance with the Determination made before the start of the relevant financial year. Under section 175(5) of the Act the Board is required, before the beginning of each financial year, to determine in respect of that year-
 - (a) the factors by reference to which the pension protection 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.
6. Section 181(3) of the Act provides that the Board must, in respect of the levy, determine the schemes in respect of which it is imposed, calculate the amount of the levy in respect of each of those schemes, and notify those liable to pay of the amount of the levy and the date or dates on which it becomes payable.
7. In accordance with section 175(2) of the Act, the process for calculating the risk based levy requires, amongst other things, an assessment of the level of underfunding of the Scheme. This is assessed by means of a section 179 valuation. A section 179 valuation is a valuation in accordance with section 179 of the Act, to determine scheme underfunding for the purposes of enabling the risk based pension protection levies to be calculated in respect of eligible schemes.

8. As at the relevant time, all schemes, save for new schemes (those created after 31 March 2004), were required to have and would have had an MFR valuation, required in respect of all occupational schemes apart from money purchase schemes and prescribed schemes under sections 63-65 of the Act. However, under the Pension Protection Fund (Valuation) Regulations 2005, as amended, eligible schemes are not required to have completed their first section 179 valuation until 31 March 2008.
9. Where there is no section 179 valuation, the reference is to the value or amount of the assets or liabilities of the scheme shown in the MFR valuation data as set out in the most recent scheme return. This will be adjusted in a manner which in the view of the Board ensures that the scheme's assets and its liabilities are treated consistently for these purposes. For this purpose the Board will take account of-
 - (i) Scheme returns which are made on or before 31 March 2006; and
 - (ii) Scheme returns which are made after that date but during the financial year 1 April 2006 to 31 March 2007, in cases where the return was made as part of the first scheme return process in respect of that scheme initiated since 6 April 2005. In such a case the Board will where necessary issue a revised notification of the amount of the levies in respect of the scheme;
 - (iii) Information which supplements or corrects information contained in a scheme return falling within sub-paragraph (i) or (ii) above, where such information is provided to the Board on or before 31 March 2006, 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.
10. It was open to the Trustees to provide a section 179 valuation at the required time. They failed to do so for no other reason than they did not send the information when they ought to have.
11. Because the Trustees failed to submit the appropriate form before 31 March 2006, the value and amount of the assets and liabilities of the Scheme, shown in the MFR valuation prepared as at 31 December 2003, supplied with the Scheme's most recent scheme return, was used in the calculation of the risk based levy.

12. The Determination was formally made on 30 March 2006. It had previously been approved by the Board, (subject to minor or drafting changes) on 22 February 2006, although it could not be formally made until a particular statutory instrument came into force.

13. Paragraph 4 of the Schedule to the Determination states:

“Where this Schedule refers to certain information having been provided to the Board (or, as the case may be, to the Pensions Regulator on the Board’s behalf) on or before a certain date, the information shall be treated as having been so provided if but only if the Board is satisfied that it has been received at the Board’s offices (or, as the case may be, the offices of the pensions Regulator) on or before the date in question. For these purposes the only permissible means of delivery of information to the Board’s offices are:

a. by e-mail to the e-mail address for the delivery of the relevant information as specified on the Board’s website at the following page:

<http://www.pensionprotectionfund.org.uk/index/risk-based-levy/further-rbl-info.htm>; or

b. by post or hand delivery to Pension Protection Fund, Knolly’s House, 17 Addiscombe Road, Croydon, Surrey, CR0 6SR.

For the avoidance of doubt, delivery by fax is not permissible. Save where the Schedule specifically provides otherwise, the deadline for any information provided to the Board otherwise than pursuant to a specific request or requirement is 31 March 2006. The Board may at its discretion take account of information provided after the applicable deadline, but before the issue of notification of the amount of the levies in respect of the scheme concerned, in cases where it appears that information was despatched at an appropriate time but was delayed in the course of post or otherwise, or in any other case where the provider of the information was prevented from meeting the deadline by the temporary inaccessibility of the Board’s website, or the interruption of electronic communications, or other like cause, so long as the information was provided as soon as reasonably practicable thereafter.”

14. Paragraph 6 of the Schedule to the Determination states:

“Nothing in the Board’s determination or this Schedule shall prevent the Board from reviewing the amount of the levies calculated in respect of a scheme where it subsequently appears to the Board that the information upon which the calculation was based was incorrect in a material respect, or that a notification required by or under a certificate in relation to contingent assets has not been duly given, or that a certificate or declaration given for the purposes of this Schedule was improperly given or contained information which was incorrect in a

material aspect. Further, in calculating the levies in respect of a scheme, the Board may disregard any such certificate or declaration if the Board believes that it has been improperly given, and may similarly disregard any information in the certificate or declaration, or in any notification or return, which is believed to be incorrect”

15. Paragraph 9(b) subsections (i) (ii) and iii) of the Schedule to the Determination state:

- “(i) Scheme returns which are made on or before 31 March 2006; and
- (ii) Scheme returns which are made after that date but during the financial year 1 April 2006 to 31 March 2007, in cases where the return was made as part of the first scheme return process in respect of that scheme initiated since 6th April 2005. In such a case the Board will where necessary issue a revised notification of the amount of the levies in respect of the scheme.
- (iii) “Information which supplements or corrects information contained in a scheme return falling within sub paragraph i or ii above, where such information is provided to the Board on or before 31 March 2006, or where it is provided after that date but in response to a request or requirement of the Board or 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.”

16. Paragraph 11 of the Schedule to the Determination states:

“The Board may, at any time prior to the calculation or any recalculation of the levy in respect of a scheme, take such steps as it thinks fit to obtain further amended information for the purposes of that calculation. But the Board is under no obligation to take such steps where information has not been provided to the Board.”

17. The Scheme was sent a levy invoice dated 6 October 2006 for £156,416.40. Following this, on 27 November 2006, the Board received an application from Mr Waters to review which reads:

“We have recently received the Pension Protection Levy Invoice for 2006/2007. We wish to appeal against the calculation for the reasons set out in the attached application.

This appeal is being made outwith the 28 day period following the issue of the invoice as the invoice was sent to the wrong address and was not received by the scheme actuary until 15 November 2006....”

18. In his application, Mr Waters re-iterated the grounds for his appeal, as outlined in paragraph 3 above and stated his reasons for applying for a decision to be reviewed/reconsidered:

“The Trustees therefore seek a review of the calculation and request that the Board take into account the full asset position of the Scheme as at 31 March 2006, including the value of the insurance policy included in the section 179 valuation submitted on 3 April 2006.”

19. The Board agreed to accept the application although it was received outside the 28 day period for submitting such an application.
20. The review decision upholding the Board’s calculation of the amount of the pension protection levies was issued on 21 December 2006.
21. By letter dated 16 January 2007, Mr Waters requested a reconsideration of the issues involved and the matter was referred to the Reconsideration Committee, who met on 13 February 2007 and upheld the Board’s calculation of the pension protection levies set out in the Scheme’s invoice. The decision notice was issued on 26 February 2007. Submission 6 of the Notice of Reconsideration Decision states:

“Submission 6

25. *“whilst the trustees accept that the calculation of the levy using the rolled MFR valuation would have been appropriate in a case where the best evidence of the factual position of the scheme as at 31 March 2006 was the old rolled forward MFR valuation, under the terms of the Determination, the trustees nevertheless had the option of requesting further information from the scheme prior to the calculation of the levy and could have calculated the levy, in accordance with the Determination, using that additional information. The PPF was aware that the section 179 valuation showed a material difference in the asset position of the scheme and therefore that the rolled forward MFR valuation did not show the correct position as at 31st March 2006. In these circumstances the trustees consider that the PPF both could have, and should have, taken into account that information or requested details in order to allow the calculation to reflect the correct factual position, rather than calculate the levy in the knowledge that the information on which that calculation was being carried out was materially inaccurate.”*

26. Under paragraph 11 of the Determination “The Board may, at any time prior to the calculation or any recalculation of the levy in respect of a scheme, take such steps as it thinks fit to obtain further or amended information for the purposes of that calculation or recalculation. But the Board is under no obligation to take such steps where information has not been provided to the Board.” In this case the Board did not take any steps to obtain further or amended

information, but the Applicant voluntarily provided further information.

27. If the Board had decided to take steps to use this information, it would have given this Scheme an unfair advantage over other schemes, for example schemes which (a) recognised in advance that they would not be able to complete a s179 valuation by the 31 March deadline and so did not attempt to carry one out, or (b) completed a s179 valuation after 31 March but did not attempt to submit it on the basis that they knew they had missed the deadline. The deadline was made clear in the Board's publications about the levy and to extend it retrospectively for one scheme would be both arbitrary and unfair."

Submissions from

Mr Waters

22. (i) A distinction should be made between whether the information used for the purpose of calculating the levy was correct and whether it was a technically correct MFR valuation.
- (ii) The Board not only had discretion to recalculate the levy, based on revised information, but had discretion also to take into account the revised information at the time when it first calculated the levy. The revised information was provided to the Board on the first working day after 31 March 2006 and drawn to the Board's attention in correspondence. The Board decided to disregard the information it had received, even before it had first calculated the levy. The Board had the power to take into account the revised information and could have done this without prejudicing the Scheme, the Board's own administrative procedures, or other schemes, but unreasonably chose not to do so.
- (iii) The Board had discretion under paragraph 9(b)(iii) and paragraph 11 of the Determination to request additional information to supplement the MFR valuation and did not properly consider whether to exercise that discretion. The Board and also the Reconsideration Committee misdirected themselves in relation to the Board's powers under paragraph 9(b)(iii).
- (iv) The Board failed to exercise its discretion and request further information and the Reconsideration Committee then failed to consider whether the Board should have exercised a discretion under paragraph 9(b)(iii). It needs to be formally determined whether the Board had a discretion to consider the later

valuation and exercised that discretion correctly or that it did not have that discretion.

- (iv) The information extracted from the MFR valuation from the Scheme's most recent return was itself correct on the MFR valuation basis, albeit that it did not reflect the factual position as at 31 March 2006.
- (v) The Board's use of the MFR valuation data, without consideration of the other powers conferred upon it by the Determination, clearly frustrated the intention of the legislation which was that the levy should reflect the actual risk of scheme default.
- (vi) The Reconsideration Committee's consideration as to whether to exercise its discretion under paragraph 11 is dealt with at paragraphs 26 and 27 of the decision. Whilst the Reconsideration Committee therefore did give some consideration to whether the Board would have been right not to exercise its discretion under paragraph 11, in reviewing that decision and presumably determining for itself that it would not exercise its discretion in order to obtain information relevant to the recalculation of the levy requested by him, the Committee should have given, but did not, any consideration to the following:
 - that the intention reflected in the legislation was that the risk based levy would be calculated to reflect the risk of the Scheme entering the PPF, assessed in accordance with all the terms of the Determination, by reference to the factual position of the Scheme as at 31 March 2006;
 - that it was publicly stated policy of the Board that the levy would be calculated on a consistent basis for all schemes and that the rolled forward methodology was intended to produce this effect;
 - that nevertheless, on this basis, the rolled forward MFR valuation for the Scheme would produce a significantly flawed result in the case of the Scheme;
 - that the Board had been aware of this fact since at least 16 June 2006 but had disregarded this information in favour of promoting the certainty of the 31 March 2006 deadline;
 - that the Board had been supplied with the section 179 valuation for the Scheme on the first working day after the 31 March 2006 deadline;

- that in fact the calculation of the levy for the Scheme had not taken place until October 2006;
 - that the first levy invoices were only sent out in September 2006 and the invoice for the Scheme's levy was only sent out in October.
- (vii) He says that all of these factors together, had they been properly considered, would have outweighed any unfairness to other schemes and would have led the Reconsideration Committee to conclude that the Board should have requested whatever additional information it required in order to recalculate the levy on a basis consistent with section 179. Had the Reconsideration Committee properly directed itself, it would have directed the Board to calculate the levy for the Scheme taking into account the Scheme's true asset position as at 31 March 2006 as reflected in the Scheme's s179 valuation certificate submitted on 3 April 2006.
- (viii) It needs to be formally determined whether the Ombudsman or his Deputy, may only intervene where the Reconsideration Committee misdirected itself or reached a conclusion not open to a reasonable decision maker.

The PPF

23. (i) Under section 175 of the Act the Board's statutory duty is to calculate the levies payable in respect of an eligible scheme in accordance with the Determination made before the start of the relevant financial year.
- (ii) The Board's position is that the deadlines set by the Determination have to be respected. The Determination allows for late information to be taken into account in certain defined circumstances, but those circumstances do not apply here.
- (iii) The Determination itself is not a reviewable matter nor is the Board entitled to amend the Determination on an individual application for review or reconsideration.
- (iv) The Board's understanding is that Mr Waters accepts that the Determination must be applied in accordance with its terms and that the levy imposed on the Scheme has been correctly calculated if the late information is disregarded, and that the late information was indeed supplied after the deadline contained in the

Determination. Although Mr Waters suggests that the Determination confers upon the Board certain discretions which ought to have been exercised in his favour, the Board disagrees.

- (v) Whilst paragraph 4 to the Determination does allow the Board discretion to allow required information to be accepted outside the statutory timescale, the reasons for doing so do not apply to this case. The late provision of a section 179 valuation was not due to a postal delay, interruption of electronic communications, or any like cause.
- (vi) Although paragraph 6 to the Determination also allows the Board to review the amount of the levies calculated in respect of a scheme, where it was subsequently revealed that the information upon which the calculation was based was incorrect in a material respect, that was also not the case here. There is no dispute that the information used for the purpose of calculating the levy was correct.
- (vii) So far as paragraphs 9(b)(iii) and 11 of the Schedule to the Determination are concerned, these do not assist Mr Waters.
- (viii) Paragraph 9(b)(iii) is explicitly concerned with cases where there is no section 179 valuation, whereas Mr Waters is seeking to contend that the levy calculation should have been based upon a late section 179 valuation. Further, this information was not provided in response to any request or requirement of the Board. Paragraph 9(b)(iii) therefore has no possible application here.
- (ix) With reference to paragraph 11, in this case the Board did not take any steps to obtain further or amended information. The second sentence of paragraph 11 makes it abundantly clear that the Board is under no obligation to do so in circumstances such as this, but Mr Waters nonetheless seeks in effect to impose such an obligation. The clear purpose of paragraph 11 is to enable the Board to obtain the information which it needs to calculate the levies. But in this case the Board had all the information which it required to calculate the levy for the Scheme in accordance with the Determination, that is using the MFR valuation. Paragraph 11 is not intended as a means of enabling schemes to avoid adverse consequences which may flow from their own failure to meet deadlines for the supply of information.

- (x) It may be, as Mr Waters suggests, that a section 179 valuation would have provided a closer approximation to the Scheme's assets and liabilities as at 31 March 2006 than an older MFR valuation. But that does not make the MFR Valuation "incorrect" for the purposes of the Determination.
- (xi) The Board has a discretion to review a calculation of levy if a scheme is at fault in providing incorrect information, and this has led to an underestimate of the levy properly payable. There will normally be an obvious public interest in ensuring that the scheme does not benefit from its own error. There is no similar public interest, in allowing a scheme to avoid the adverse consequences of its own failure to meet reasonable deadlines set for the provision of information.
- (xii) The Board can see no reason why the Scheme should be given extra time over other schemes to complete a voluntary form, and to do so would be in contravention of the Board's stated principle of fairness, as it would give the Scheme an advantage over all other eligible schemes. To permit some schemes to submit data after the respective deadlines would be unfair, unless it were possible for all schemes, and would give those schemes receiving special treatment an advantage over other eligible schemes. In addition to the question of certainty, the need for administrative workability requires a cut off point to be established, and then adhered to, unless there is some genuinely exceptional reason for accepting such data at a later date.
- (xiii) The reasons for the late delivery of a section 179 valuation appear to be administrative and it is not for the Board to investigate the circumstances leading to such a delay, which may be governed by contractual and legal relationships between the relevant parties.
- (xiv) If the Ombudsman were to conclude that the Board did have a discretion under paragraph 6 to review the levy calculation in this case, then the question would arise of how the Ombudsman should approach the referral to him of a refusal to exercise that discretion.
- (xv) It is submitted that, by virtue of paragraph 16 of the Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005, the Ombudsman may only intervene where the decision of the reconsideration committee "was not reached correctly". In the context of the exercise of a

discretion, the relevant decision will only not have been reached correctly if the Reconsideration Committee has misdirected itself or reached a conclusion not open to a reasonable decision maker. Here the Reconsideration Committee has proper reasons for concluding that it would not be appropriate to exercise any discretion in Mr Waters' favour.

CONCLUSIONS

24. This is a reviewable matter, by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004. The reviewable matter in question, is the calculation of the risk-based levy required of the Scheme in the financial year 2006/2007.
25. The PPF levies must be calculated in accordance with the Determination. The PPF has correctly submitted that the Determination itself is not a reviewable matter, nor is the Board entitled to amend the Determination on an individual application for review or reconsideration.
26. For the purposes of calculating the levy in accordance with the Determination, the Board requires either the submission of a section 179 valuation by the due date, in this case, by 31 March 2006, or, in the absence of a section 179 valuation, an MFR valuation, as prepared from the most recent scheme return.
27. What the Trustees are seeking to argue, is that the Board has discretion, where the information they have used is subsequently revealed to be deficient, to recalculate the levy based on the revised information, or at least to request additional information which it should then take into account in calculating the levy. They say that the section 179 valuation that was delivered late revealed that an insurance policy was an asset of the Scheme as at 31 March 2006, and, if taken into account, would have reduced the Scheme's risk based levy to £2,624.
28. The Trustees failed to deliver the section 179 valuation on time. The Reconsideration Committee has considered whether it has a discretion, to allow a later valuation to be used in calculating the levy payable, but concluded it does not. A number of reasons have been put forward by the PPF, as to why it is not appropriate to revisit the calculation in this case.
29. I find some of these more compelling than others. I am not persuaded by their argument that it would be unfair to other schemes to allow the late valuation to be taken into account. The amount of the levy paid by this Scheme for the year

2006/2007 does not affect the amount of the levy paid by those other schemes. The only issue of fairness relates to a consistent application of the circumstances in which the Board will review a calculation by virtue of Paragraph 6 of the Determination.

30. I am, however, albeit somewhat reluctantly, more persuaded by their argument that the information presented to the Board by the due date was not “incorrect”. There is no dispute that the Board correctly used information extracted from the MFR valuation from the Scheme’s most recent Scheme return, which in itself was also correct. The information the Board had to hand, therefore, was sufficient and within the parameters of the legislation for them to calculate the levy payable in this case. Paragraph 6 enables the Board to review a levy calculation where it appears that the information upon which the calculation was based was incorrect in a material respect. As I accept the Board’s argument that the information used was not incorrect, it follows that I accept that a review in accordance with Paragraph 6 is inappropriate.
31. Paragraph 9 (b) (iii) does allow information provided after 31 March 2006, that supplements or corrects information contained in a scheme return and which falls within either paragraph 9 (b)(i) or (ii) and that has been requested by either the Board or the Pension Regulator, to be treated as forming part of the scheme return in question, as claimed by Mr Waters. However, as the section 179 valuation was provided voluntarily after the due date, the Board had no power to exercise its discretion and consider that it formed part of the information to be considered in the scheme return by virtue of this provision.
32. Mr Waters seeks to argue that the Board should have exercised its discretion, under paragraph 11, and requested further information, relating to the insurance policy asset. It is clear that the purpose of that paragraph is to enable the Board to obtain the information which it needs to calculate the levies. In this case, the valuation that had been submitted by the due date was fit for that purpose and the Board were not, therefore, obliged to take steps to obtain further information.
33. Mr Waters also seeks to argue, that the Reconsideration Committee, failed to properly consider whether the Board properly exercised its discretion, particularly with regard to paragraph 11. I have already concluded, that under the circumstances relating to this case, the Board were under no obligation to request further information and I am accordingly, unable to reach a conclusion that the Reconsideration Committee had reached its decision incorrectly.

34. I mentioned above that it was with some reluctance that I accept the Board's argument that the information they held as at 31 March 2006 was not "incorrect". There can be no doubt that the factual position which persisted at that date was markedly different to that adopted by the Board in calculating the levy. It follows that, as Mr Waters rightly points out, if there is an overarching objective of pitching the levy at a level which reflects the true risk of a scheme being taken on by the PPF, that has not been achieved. However, as I have concluded that the Board have correctly applied the legislation and the Determination published thereunder, the fact that any such objective may or may not have been achieved is a matter for the legislature.
35. The complaint is not upheld.

CHARLIE GORDON

Deputy Pension Protection Fund Ombudsman

18 March 2008

APPENDIX

RELEVANT LEGISLATION

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 eligible schemes.

In this Chapter "pension protection levy" means a levy imposed in accordance with this section.

(2) For the purposes of this section-

- (a) a risk-based pension protection levy is a levy assessed by reference to-
 - (i) the difference between the value of a 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 a scheme, and
 - (iii) if the Board considers it appropriate, one or more other risk factors mentioned in subsection (3), and

(b) a scheme-based pension protection levy is a levy assessed by reference to-

- (i) the amount of a scheme's liabilities to or in respect of members (other than liabilities in respect of money purchase benefits), and
- (ii) if the Board considers it appropriate, one or more other scheme factors mentioned in subsection (4).

(3) The other risk factors referred to in subsection (2)(a)(iii) are factors which the Board considers indicate one or more of the following-

- (a) the risks associated with the nature of a scheme's investments when compared with the nature of its liabilities;
- (b) such other matters as may be prescribed.

(4) The other scheme factors referred to in subsection (2)(b)(ii) are-

- (a) the number of persons who are members, or fall within any description of member, of a scheme;
 - (b) the total annual amount of pensionable earnings of active members of a scheme;
- [Ed note: Sub-s (4)(c) is in force for limited purposes only; see the "Commencement" note to this section.]
- (c) such other factors as may be prescribed.

(5) The Board must, before the beginning of each financial year, determine in respect of that year-

- (a) the factors by reference to which the pension protection 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.

179 Valuations to determine scheme underfunding

(1) For the purposes of enabling risk-based pension protection levies (within the meaning of section 175) to be calculated in respect of eligible schemes, regulations may make provision requiring the trustees or managers of each such scheme to provide the Board or the Regulator on the Board's behalf-

- (a) with an actuarial valuation of the scheme at such intervals as may be prescribed, and
- (b) with such other information as the Board may require in respect of the assets and protected liabilities of the scheme at such times as may be prescribed.

(2) For the purposes of this section, in relation to a scheme-

"an actuarial valuation" means a written valuation of the scheme's assets and protected liabilities prepared and signed by the actuary;

"the actuary" means-

- (a) the actuary appointed under section 47(1) (b) of the Pensions Act 1995 (c. 26) (professional advisers) in relation to the scheme, or
- (b) if no such actuary has been appointed-
 - (i) a person with prescribed qualifications or experience, or
 - (ii) a person approved by the Secretary of State.

(3) Regulations under this section may prescribe how-

- (a) the assets and the protected liabilities of schemes, and
 - (b) their amount or value,
- are to be determined, calculated and verified.

(4) Subject to any provision made under subsection (3), those matters are to be determined, calculated and verified in accordance with guidance issued by the Board.

(5) In calculating the amount of any liabilities for the purposes of a valuation required by virtue of this section, a provision of the scheme rules which limits the amount of the scheme's liabilities by reference to the value of its assets is to be disregarded.

(6) In this section references to "assets" do not include assets representing the value of any rights in respect of money purchase benefits under the scheme rules.

181 Calculation, collection and recovery of levies

(1) This section applies in relation to-

- (a) the initial levy imposed under section 174 in respect of a scheme, and
- (b) any pension protection levy imposed under section 175 in respect of a scheme.

(2) The levy is payable to the Board by or on behalf of-

- (a) the trustees or managers of the scheme, or
- (b) any other prescribed person.

(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 in respect of the scheme of the amount of the levy in respect of the scheme and the date or dates on which it becomes payable.

(4)The Board may require the Regulator to discharge, on the Board's behalf, its functions under subsection (3) in respect of the levy.

(5)Where a scheme is an eligible scheme for only part of the period for which the levy is imposed, except in prescribed circumstances, the amount of the levy payable in respect of the scheme for that period is such proportion of the full amount as that part bears to that period.

(6)An amount payable by a person on account of the levy is a debt due from him to the Board.

(7)An amount so payable may be recovered-

- (a) by the Board, or
- (b) if the Board so determines, by the Regulator on its behalf.

(8)Regulations may make provision relating to-

- (a) the collection and recovery of amounts payable by way of any levy in relation to which this section applies;
- (b) the circumstances in which any such amount may be waived.

The provision (above) is subject to modification

The Pension Protection Fund (Valuation) Regulations 2005

Provision of actuarial valuation to determine scheme underfunding

(1)The trustees or managers of an eligible scheme shall provide the Board or the Regulator on the Board's behalf with its first section 179 valuation-

- (a) in the case of an eligible scheme which is a registrable scheme prior to 6th April 2007-
 - (i) within 15 months of the relevant time of that valuation; or

(ii) by no later than 31st March 2008,

whichever is the earlier;

- (b) in the case of an eligible scheme which becomes a registrable scheme on or after 6th April 2007, within 15 months of the effective date of the first actuarial valuation obtained by them under section 224 of the Act (actuarial valuations and reports).

The Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005

16 Reaching and giving determinations and consequential directions

(1)If the PPF Ombudsman determines that the decision of the Reconsideration Committee in relation to a reviewable matter referred to him was reached correctly, the PPF Ombudsman must-

- (a) determine that it is not appropriate for the Board to take any action in relation to the matter; and
- (b) remit the matter to the Board with any directions.

(2)If the PPF Ombudsman considers that the decision of the Reconsideration Committee in relation to a reviewable matter referred to him was not reached correctly, the PPF Ombudsman-

(a) must-

(i) determine what action, if any, the Board should take in relation to the matter; and

(ii) remit the matter to the Board with directions for the Board-

(aa) to vary the determination, direction or other decision made by the Reconsideration Committee; or

(bb) to revoke and replace the determination, direction or other decision made by the Reconsideration Committee; and

(b) may direct-

(i) that-

(aa) any determination, direction or other decision which is to be made by the Board in accordance with any determination made or direction given by him; or

(bb) any variation, revocation or substitution of the determination, direction or other decision of the Reconsideration Committee which is to be made by the Board in accordance with any determination made or direction given by him,

is to be treated as if it were made at such time (which may be at a time prior to his determination or direction) as he considers appropriate;

(ii) that any notice varied, substituted, issued or given by the Board in accordance with any determination made or direction given by him is to be treated as if-

(aa) it were issued or given at such time (which may be a time prior to his determination) as he considers appropriate;

(bb) it became binding for the purposes of Part 2 of the Act (the Board of the Pension Protection Fund) at the time at which he makes his determination or gives his direction or at such later time as he considers appropriate;

(iii) the Board-

(aa) to pay such compensation as he considers appropriate to such persons as he considers appropriate;

(bb) to take or refrain from taking such other steps as he may specify.

(3) The determination and directions must be in writing and must include-

(a) a statement of the reasons for them;

(b) an explanation as to whether and, if so, to what extent the Board is directed to-

(i) vary or revoke a determination, direction or other decision previously made by the Reconsideration Committee;

(ii) revoke such a determination, direction or other decision and replace it with a different determination, direction or other decision; and

(c) a statement of any legislation relied on by the PPF Ombudsman in reaching the determination.

(4) The PPF Ombudsman must-

(a) give notice of the determination and directions to each party to the reference; and

(b) notify the following persons of the determination and directions in such form and manner as he considers appropriate-

(i) any person notified of the reference under regulation 5(1) (b); and

(ii) any person to whom he has directed that compensation is to be paid.

(5) Subject to section 217 of the Act (determinations of the PPF Ombudsman), the determination and directions are final and binding on-

(a) the persons to whom notice or notification is given under paragraph (4)(a) or (b);

(b) any interested person as interpreted in accordance with regulations made under section 207(1)(b) (review and reconsideration of reviewable matters) of the Act.

(6) The Board has the power to do anything that the PPF Ombudsman directs under this regulation.

(7) The Board's power-

(a) under section 191 of the Act (notices requiring provision of information); and

(b) under regulations made under section 207(1) of the Act,
shall apply for the purposes of dealing with any matter remitted to it.

(8) If the Board is directed under this regulation to-

(a) Vary a determination, direction or other decision previously made by the Reconsideration Committee; or

(b) replace such a determination or direction or other decision with a different determination direction or other decision,

it must send a copy of the varied or replacement determination, direction or other decision to the applicant, the PPF Ombudsman and any person notified of the reference under regulation 5(1) (b).