

PPF Restructuring and Insolvency Team
Guidance Note 10
Potential claims as a result of employer insolvency

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1. Background

- 1.1. This guidance note explains the PPF's approach to certain claims that can arise following the insolvency of an employer of a defined benefit pension scheme that is eligible for the PPF.
- 1.2. It is intended primarily for use by insolvency practitioners (IPs), but certain aspects may be useful to other parties such as pension scheme trustees, actuaries and legal advisors.

2. Claim for the pension scheme deficit

- 2.1. If the employer of a defined benefit pension scheme undergoes an insolvency event, the quantum of the scheme trustees' claim in the insolvency proceeding(s) is calculated as the difference between the scheme liabilities and the scheme assets. The liabilities are assessed by reference to the cost of securing full benefits for all members of the scheme with an insurer, often referred to as the "buy-out" basis.
- 2.2. The calculation is done by the scheme actuary, who produces a debt certificate in accordance with section 75 of the Pensions Act 1995 (subject to paragraph 2.5 below). In most circumstances, it will be done as at the date immediately preceding insolvency. However, if the scheme had gone into wind up prior to insolvency, the trustees may select the appropriate date after the commencement of the scheme winding up but before the date of insolvency.

- 2.3. We do not expect IPs to instruct their own experts to review the work carried out by the scheme actuary to support a claim and case law¹ confirms that the courts are not likely to entertain challenges to the actuary's certifications of employer debt claims.
- 2.4. The actuary's section 75 debt certificate will not usually be available when IPs are seeking resolutions from creditors pertinent to the conduct of the insolvency, for example, the approval of the administrators' proposals. In such circumstances, it is usual practice for a provisional proof of debt to be submitted based on the most recent available scheme funding information on a buy-out basis. This will typically, but not always, be the most recent triennial valuation of the scheme.
- 2.5. There are circumstances where the PPF may consider that it is not economic for further actuarial work to be undertaken to provide a formal section 75 debt certificate based on a more recent assessment of the scheme deficit to claim in the insolvency for dividend purposes. In deciding whether a section 75 certificate is appropriate, consideration will be given to, among other things, the cost of the work, the likely dividend for creditors, the impact on other creditors of any changes to the claim and how long before insolvency the most recent available valuation took place. Such decisions will be agreed with IPs or their staff.
- 2.6. Claims for the scheme buy-out deficit are not preferential within the meaning of schedule 6 of the Insolvency Act 1986 and schedule 4 of the Pensions Schemes Act 1993.
- 2.7. It is the PPF's policy always to submit at least a provisional proof of debt, even if there is no immediate prospect of receiving a dividend. The intention is to preserve the scheme's position in relation to the insolvency in case it later transpires that money will be available from the insolvency for non-preferential creditors.
- 2.8. On occasion, more than one employer may be responsible for the scheme, and they will not necessarily all be insolvent. Specialist actuarial and legal advice will be obtained as appropriate to determine how the deficit in the scheme should be apportioned.

3. The PPF assessment period and locus to claim in insolvency

- 3.1. For schemes that are eligible for the PPF, a qualifying insolvency event² in relation to the employer will trigger the commencement of a PPF assessment period. During the assessment period, the creditor rights in relation to any debt owed to the scheme trustees by the employer are exercised by the PPF to the exclusion of the trustees.³
- 3.2. During the assessment period, an actuarial valuation will be commissioned to assess how well the scheme is funded on a "PPF basis", that is, with liabilities calculated by reference to PPF levels of compensation. This is known as a section 143 (s143) valuation.
- 3.3. The finalised s143 valuation will be issued to IPs if they are still in office. However, the s143 valuation is only for the purposes of determining whether the PPF will assume responsibility for a scheme. The benefits being valued in a s143 valuation are different

¹ *Cornwell & others v Newhaven Port & Properties Limited* [2005] EWHC 1469 (Ch)) and *Gleave and others v Board of the Pension Protection Fund* [2008] EWHC 1099 (Ch)

² Section 121(3) Pensions Act 2004 and Regulation 5 Pension Protection Fund (Entry Rules) Regulations 2005

³ Section 137 of the Pensions Act 2004

from (and lower than) the benefits that are valued for the purposes of determining the amount of the scheme trustees' claim in the employer's insolvency (see section 2 above).

- 3.4. If the s143 valuation discloses that the scheme is in surplus on a PPF basis, the trustees will have the opportunity to secure benefits that are equal to or higher than PPF levels of compensation.
- 3.5. If the trustees are unable to obtain a full buy-out quotation, but the scheme has sufficient assets to pay at least PPF levels of compensation, the trustees must, within a period of six months from when the s143 valuation binds, apply to the PPF to continue to run as a "closed scheme". The assessment period will end if a scheme is approved to run on as a closed scheme, but the PPF will retain the creditor rights.
- 3.6. If the s143 valuation discloses that the scheme is underfunded on a PPF basis, the PPF will assume responsibility for the scheme and the PPF will continue to exercise the creditor rights.
- 3.7. In the scenario where a scheme is rescued, the creditor rights against the employer will revert to the scheme trustees following the completion of a "binding period".
- 3.8. For more information about the PPF's standing as a creditor, please see guidance note 1.

4. Security and receivership

- 4.1. Scheme trustees sometimes hold security over scheme employers' assets, for example, in the form of debentures or mortgages. These will usually have been granted in return for a concession from trustees on such matters as the schedule of contributions payable by the employer or to obtain a reduction in the PPF levy.
- 4.2. The creditor rights in respect of the management and enforcement of security in relation to any debt due to the trustees by the employer are also exercised by the PPF to the exclusion of trustees during the assessment period.⁴
- 4.3. It is rare for the PPF to be in a position to make an appointment of administrators because the assessment period does not commence until there has been an insolvency event. However, we shall work with trustees to make an appointment if it is considered appropriate.
- 4.4. If an employer has granted security over an interest in land to the trustees, we expect IPs to discuss the strategy to maximise value with us at the earliest opportunity.
- 4.5. If that interest in land generates rent, there is a question of whether the rental income is also caught by the security. That will clearly depend on the wording of the security documentation, but IPs sometimes argue that the rent is not subject to a fixed charge because the security holder has not exercised control over the proceeds, following the reasoning in *Spectrum Plus*⁵.

⁴ Section 137 of the Pensions Act 2004

⁵ *National Westminster Bank plc v Spectrum Plus Limited and others* [2005] UKHL 41

- 4.6. Our starting assumption is that it will be most appropriate for a fixed charge receiver to be appointed. We see little merit in paying duplicative fees to IPs and their instructed property agents. Furthermore, we would not wish to risk foregoing rental receipts because of a failure to exercise control.
- 4.7. We recognise that, if the employer is in administration, a moratorium on creditor action will apply, but we expect administrators to consent to the appointment of receivers when that is the wish of the PPF.

5. Guarantees

- 5.1. Scheme trustees sometimes have the benefit of a guarantee or other form of contingent asset. This may have been granted to the trustees to achieve a reduction in the PPF levy.
- 5.2. If the contingent asset has been provided to trustees by an entity that is not a scheme employer, the PPF will work with the trustees to ensure recoveries are maximised.

6. Claims on the Redundancy Payments Service (RPS)

- 6.1. Unpaid employer and “worker” contributions due to the scheme may be recovered from the National Insurance Fund, via the RPS. In addition to such unpaid contributions in respect of ongoing accrual of pension benefits, the following overdue but unpaid items are potentially recoverable:
 - agreed scheme deficit reduction contributions under a schedule of contributions;
 - scheme expenses that the employer has agreed to pay; and
 - PPF levy.
- 6.2. Guidance Note 12 - Completing forms for claims on the Redundancy Payments Service provides detailed guidance on the statutory framework and the completion of the forms to make claims on the RPS.
- 6.3. Our expectation is that a restructuring should not result in a reduced return to the scheme as a result of it causing a lower potential return from the RPS.

7. The interaction between claims

- 7.1. If recoveries are received from parties that are not a scheme employer (for example, guarantors or the providers of third-party security), they do not serve to limit the claim against the employer in its insolvency.
- 7.2. There will sometimes be instances where proceeds are received by the scheme from other sources, for example, legal claims successfully pursued.
- 7.3. Receipt of money by scheme trustees, subsequent to the section 75 debt being calculated, in respect of an asset that had reasonably been valued at nil in the scheme accounts, does not operate to reduce the amount of the certified section 75 debt.⁶

⁶ *BESTrustees plc v Kaupthing Singer & Friedlander (in administration)* [2013] EWHC 2407 (Ch)

- 7.4. The same consideration will apply to most receipts from the RPS. We do not consider that our claim for the scheme buy-out deficit and any subrogated claim the RPS may have in respect of sums it has paid for unpaid contributions will result in a double proof for the same debt in an insolvency.
- 7.5. The RPS's claim arises out of section 228(3) of the Pensions Act 2004, which provides that any unpaid amount payable in accordance with the schedule of contributions by or on behalf of the employer or an active member of a scheme shall be treated as a debt due from the employer to the trustees of the scheme. The RPS might therefore be expected to assume the trustees' rights under section 228(3) in respect of the contributions it has paid. However, the quantum of the debt due under section 75 of the Pensions Act 1995, and the right of the PPF (exercising the creditor rights of the trustee) to claim for the full amount of that debt, is not affected.

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Please note this leaflet seeks to assist stakeholders and insolvency professionals on our approach to restructuring and insolvency cases. It is an accompaniment to existing publications from the PPF published on our website, not a substitute. We encourage restructuring & insolvency practitioners and trustees to seek appropriate, specific case guidance.

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