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Case No: Ch 2013 0129

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23rd January 2014

Before :

MR ANDREW SPINK QC (sitting as a Deputy Judge of the Chancery Division)

- -

In the matter of AN APPEAL UNDER SECTION 217 OF THE PENSIONS ACT 2004

And in the matter of THE WEST OF ENGLAND SHIP OWNERS INSURANCE SERVICES LIMITED RETIREMENT BENEFITS SCHEME

Between :

The Board of the Pension Protection Fund	**Appellant**
- and -	
The Trustees of the West of England Ship Owners Insurance Services Limited Retirement Benefits Scheme	**Respondent**
-and-	
The Deputy Pension Protection Fund Ombudsman	**Interested Party**

- -
- -

Mr Nigel Giffin QC (instructed by **Clyde & Co LLP**) for the **Applicant**
Mr Javan Herberg QC (instructed by **Norton Rose Fulbright LLP**) for the **Respondent**
Mr Jonathan Evans (instructed directly) for the **Interested Party**

Hearing dates: 16th & 17th October, 2013

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APPROVED JUDGMENT

Andrew Spink QC:

1. This is an appeal brought on a point of law pursuant to section 217 of the Pensions Act 2004 ("**the Act**") by the Board of the Pension Protection Fund ("**the Board**") against a determination ("**the Determination**") of the Deputy Pension Protection Fund Ombudsman ("**the Ombudsman**")[1] dated 12 February 2013.

2. In the Determination the Ombudsman determined a reference of a *"reviewable matter"*[2] made by the Trustees ("**the Trustees**") of the West of England Ship Owners Insurance Services Limited Retirement Benefits Scheme ("**the Scheme**").

3. The reviewable matter in question was the calculation ("**the Levy Calculation**") by the Board, pursuant to section 181(3)(b) of the Act, of the amount of the pension protection levy ("**the Levy**"), and in particular the "risk-based" element of the Levy ("**the Risk-based Levy**"), applicable to the Scheme for the 2010/11 financial year. The Levy Calculation had been undertaken by the Board in purported proper compliance with the rules governing that calculation, being the terms and applicable procedures set out in the Board's levy determination for 2010/11 ("**the 2010/11 Levy Determination**"), the 2010/11 version of the annual determination made by the Board pursuant to section 175(5) of the Act[3].

4. Initially there was an internal review of the insolvency risk score forming part of the Risk-based Levy aspect of the Levy Calculation by Dun & Bradstreet (UK) Limited ("**D&B**"), the third party whose assessment of insolvency risk

[1] In his skeleton argument on behalf of the Ombudsman, Mr Evans provided the following explanatory footnote: *"The Deputy PPF Ombudsman is currently Ms Jane Irvine. The PPF Ombudsman is Mr Tony King. The Deputy Ombudsman has the same powers and fulfils the same functions as the Ombudsman. This appeal concerns a decision of the Deputy Ombudsman; for simplicity no distinction is drawn between the two roles and the Ombudsman is referred to as a female."* I adopt the same approach to nomenclature in this judgment.

[2] See section 207 and Schedule 9 of the Act and further below at paragraph 28.

[3] The system for and method of calculation of the Levy in individual cases is referred to in more detail in the next section of this judgment.

was adopted by the Board, which resulted in there being no change made by D&B to the insolvency risk score.

5. In parallel with the internal D&B review, the Levy Calculation was reviewed as a reviewable matter by the Board pursuant to section 207 of the Act and Regulation 2 of the Pension Protection Fund (Review and Reconsideration of Reviewable Matters) Regulations 2005, following an application for a review made by the Trustees. The Board affirmed the correctness of the Levy Calculation, with the consequence that the Trustee applied for a reconsideration of the Board's review decision pursuant to Regulation 14 of the same Regulations. In its decision dated 23 September 2011 the Reconsideration Committee upheld the Levy Calculation on the basis of its view as to the correct construction and application of the 2010/11 Levy Determination.

6. Thereafter, the Trustees referred the matter for further review to the Ombudsman pursuant to section 213 of the Act and Regulation 2 of the Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005 ("**the PPF Ombudsman Regulations**"). The Ombudsman upheld the Trustees' reference, concluding that the Levy Calculation had been undertaken incorrectly and remitted the matter back to the Board, directing (a) the basis on which the Risk-based Levy should be calculated, (b) that interest for late payment of the Levy should not be charged to the Scheme by the Board, and (c) that the Board should contribute £10,000 towards the Trustees' legal costs.

7. After the Board had issued its appeal under section 217 of the Act against the Determination, the Ombudsman successfully obtained an order from Morgan J dated 23 July 2013 that she be permitted to file evidence and make representations on the appeal pursuant to CPR 52.12A. There were therefore three parties before me on the hearing of the Board's appeal, represented as set out in the heading to this judgment.

8. In broad outline, the following main questions arise on this appeal:

   (a) First, was the Ombudsman's conclusion that the decision of the Reconsideration Committee as to the construction and application of the 2010/11 Levy Determination had not been reached correctly wrong in law

for any of the three reasons set out in paragraphs 11, 12, and 13 of the Board's Grounds of Appeal ("**the Construction Issue**")?

(b) Second, there is a question raised in paragraph 14 of the Board's Grounds of Appeal about the way in which the Ombudsman should have disposed of the section 213 reference in view of her findings on the central points of law and, in particular, whether and, if so, to what extent she should have remitted any outstanding issues in relation to the Levy Calculation to the Board for it to resolve rather than determining them herself ("**the Remission Issue**").

(c) Third, if it was open to the Ombudsman not to remit outstanding issues relating to the Levy Calculation to the Board for it to determine but rather to determine them herself (as she in fact did), did she err in law in determining these issues in the way she did by failing to take account of material before her or arguments addressed to her by the Board (paragraph 15 of the Board's Grounds of Appeal) ("**the Merits Issue**").

(d) Fourth, did the Ombudsman have jurisdiction to order that interest for late payment of the Levy should not be charged and, if so, did she act in breach of the principles of natural justice in doing so in this case (paragraphs 16 and 17 of the Board's Grounds of Appeal) ("**the Interest Issues**")?

(e) Fifth, did the Ombudsman have jurisdiction to make the order as to costs that she did; if so, did she act in breach of the principles of natural justice in doing so in this case and, if not, was this an appropriate case for an award of costs in any event (paragraphs 18, 19 and 20 of the Board's Grounds of Appeal) ("**the Costs Issues**")?

9. Before turning to consider the arguments advanced on the appeal it is necessary to describe the statutory scheme that gave rise to the Levy Calculation and to set out certain other aspects of the facts and procedural history.

The statutory scheme for the determination, calculation, collection and recovery by the Board of the Levy

10. The contents of the following eight paragraphs are largely taken from the skeleton argument prepared by Mr Giffin on behalf of the Board. Save as

indicated below, they were essentially agreed by the other parties or were uncontroversial.

11. The Pension Protection Fund ("**the PPF**") exists to provide compensation to members of defined benefit pension schemes when scheme employers become insolvent, leaving schemes in deficit. Occupational pension schemes which are defined benefit rather than money purchase schemes are eligible for the PPF unless they fall into certain prescribed categories: see section 126 of the Act. The PPF is financed by an annual levy raised on eligible schemes, of which the Levy, as defined above, is part and is raised in order to finance the fund itself, along with the administration levy, which is raised in order to finance the administration of the Board and the PPF. Essentially, the Levy is a statutory debt owed to the Board by the trustees of the scheme: see sections 181(2) and (6) of the Act.

12. The Levy comprises a scheme-based levy (accounting for 20% of the total, and related to the number of scheme members and the size of the scheme's liabilities) and the Risk-based Levy already referred to above (accounting for 80% of the total). As I have already indicated above, it is the assessment of the Scheme's Risk-based Levy for 2010/11 which is in issue here.

13. Under section 175(2) of the Act, the Risk-based Levy is assessed by reference to (a) the difference between the value of the scheme's assets and the amount of its liabilities, (b) the likelihood of an insolvency event occurring in relation to the scheme employer and (c) certain other risk factors if the Board considers it appropriate.

14. The essentials of the approach taken by the Board to the calculation of the Risk-based Levy have not altered since the first year in which the Risk-based Levy fell to be imposed, 2006/07, although the details have changed from year to year. There are two distinct stages to the process by which a Levy is determined each year.

15. The first stage is provided for by section 175(5) of the Act, which states as follows:

> *"(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."

The making of the section 175(5) Levy Determination has to be preceded by consultation if anything is changing from the previous year, and the Levy Determination has to be published when made: see section 176.

16. The second stage is provided for by section 181(3) of the Act, which states as follows:

"(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."

17. It was common ground that this means that the Board has two quite distinct functions in this context. Under section 175(5) the Board has to lay down the rules for calculating the Levy. It does so by making a Levy Determination of general application, which must be consulted upon and published. Under section 181(3)(b) the Board has to calculate the Levy for an individual scheme. This is to be done by applying to that individual scheme the rules contained in the section 175(5) Levy Determination.

18. It was also common ground that the making of the section 175(5) Levy Determination is an act of policy – the Board has, in the exercise of its discretion, to decide how best to formulate the rules for working out the Levy.

19. With regard to the Board's task under section 181(3)(b), however, there is a dispute between the Board and the Trustees which goes to the heart of the appeal. Is this task *"essentially mechanical"*, as it was put by Mr Giffin on behalf of the Board, that is to say one of calculation, with there being no room for discretion in applying the Levy Determination in relation to the part of the Calculation that is material to the appeal? Or, did the material provisions of the 2010/11 Levy Determination give the Board some discretion when assigning the

Risk-based Levy in the circumstances of this case, so as to enable it to ensure that the 2010/11 Risk-based Levy for the Scheme was "correct" as the Trustees would characterise it?

The 2010/11 Levy Determination

20. The Board's 2010/2011 Levy Determination dated 18 December 2009 was, as in previous years, issued pursuant to section 175(5) of the Act (set out in paragraph 15 above).

21. The key provisions relate to the calculation of the Risk-based Levy which, as indicated above, is assessed taking into account the likelihood of an insolvency event occurring in relation to the scheme employer, in this case West of England Insurance Services (Luxembourg) SA ("**the Scheme Employer**").

22. The Board's case (not challenged on this appeal) was that it would be impractical for the Board to assess for itself the insolvency risk which a particular employer poses from time to time. As Mr Giffin put it in his skeleton argument:

> *"There are thousands of scheme employers. The Board has neither the expertise nor the resources to undertake such a task, and could only put itself in a position to do so by turning itself into a soi-disant credit reference agency, at great cost to the pension schemes which have to pay the administration levy.*
>
> *Therefore, it has always been a feature of the Levy Determination that it adopts, as one of the factors in the levy calculation, an insolvency probability based upon the so-called "failure score" assigned to the employer in question by a commercial provider of information on creditworthiness. Such a provider is engaged under contract to supply the Board with failure scores. The provider is selected through a competitive procurement process. So far, it has always been Dun & Bradstreet (UK) Ltd*."

23. The approach taken in the 2010/11 Levy Determination (as in previous years) to the assessment of the assumed probability of insolvency for each scheme employer was to adopt in the case of each employer the "failure score" that was assigned to that employer by D&B in the ordinary course of its business on 31 March 2009 ("**the Failure Score**"). Where a UK Failure Score could be

assigned to the employer by D&B in the United Kingdom, then that was the score used. Where there was no UK failure score, a non-UK failure score assigned by a D&B undertaking would be used if available. The present case was a non-UK case, because the Scheme Employer was a Luxembourg company.

24. In these circumstances, the material provisions of the 2010/11 Levy Determination for the purposes of this appeal are as follows:

(a) **Rule B2**:

*"**Correction by the Board***

B2.1 When could data be corrected?

This Rule B2.1 applies if it appears to the Board that either:

*(1) **the information supplied for or used in the calculation of the Levies is incorrect in a material respect**;*

…

B2.2 Correction of the data

*(1) Where Rule B2.1 applies, the Board may calculate the Levies on the basis of information which appears to it to be correct for the purposes of these Rules. **Where the Levies have already been calculated in respect of a Scheme, the Board may review and revise the amount of the Levies calculated in respect of a Scheme on the basis of information which appears to it to be correct but it shall not be under an obligation to act**.*

(2) The Board is under no obligation to take into account corrected information merely because the Scheme has been disadvantaged by the failure of the trustees or those acting on its or their behalf to supply correct information at the proper time.

*(3) For the purposes of Rule B2.1(1), **information is not incorrect where it is correct and legitimate in itself, but it would have been open to the person supplying it to supply some different or additional information which might have caused these Rules to be applied differently**.*

(emphasis added)

(b) **Rule E2**:

*"**How to calculate [Assumed Probabilities of Insolvency]***

…

E2.2 Non-UK Failure Scores

(1) This Rule E2.2 applies where DBUK is unable to assign a UK Failure Score to an Employer, but DBUK or one of its associated undertakings is able to assign a Non-UK Failure Score.

…

(3) The Non-UK Failure Score which applies to an Employer shall be the value which DBUK or, where applicable, the relevant associated undertaking informs the Board that it has assigned to that Employer as its non-UK Failure Score. For the avoidance of doubt, ***Non-UK Failure Scores to be provided to the Board are****, subject to Rule E2.3 (Severe risk parents), to be* ***the normal non-UK failure score which was assigned to that Employer by DBUK (or the relevant associated undertaking, as the case may be) in the ordinary course of its businesses as at the Measurement Time****, (or, if different, the score which would have been assigned if account had been taken of all data that was received by DBUK or the relevant associated undertaking, as the case may be, at least 24 hours before the Measurement Time).”* (emphasis added)

(c) **Rule E3**:

*“**DBUK appeals***

E3.1 When does this Rule E3 apply?

This Rule E3 can only apply in relation to a decision of DBUK, where DBUK informs the Board that:

(1) It has made a decision under either of Rules E3.3 or E3.4;

(2) that decision was made for a reason in Rule E3.5;

…

E3.3 DBUK may act if the score is incorrect

DBUK may decide for a reason in Rule E3.5 that the Failure Score or other measure applied in accordance with Rules E2.1 to E2.7 inclusive assigned to an Employer as at the Measurement Time, was incorrect.

…

E3.5 The reasons applicable for Rule E3.3 and E3.4

DBUK may only act if it decides that its original decision was based upon information which, as at the Measurement Time, was incorrect or incomplete by comparison with the information which should normally have been taken into account by DBUK in assigning a Failure Score or other measure at that date:

…

(2) because DBUK did not apply the procedures for assigning the Failure Score or other measure as they should normally have been applied."

The statutory review process including references to the Ombudsman

25. Again I take what follows in the next five paragraphs largely from Mr Giffin's skeleton argument, being points that were either agreed or were uncontroversial.

26. Under sections 206 and 207 of the Act and the Pension Protection Fund (Review and Reconsideration of Reviewable Matters) Regulations 2005 the Board is required to review certain of its actions upon the application of an interested person. If the applicant is dissatisfied with the review decision, it may call for a further reconsideration by the Board's Reconsideration Committee (whose members must not have been involved in the original decision). If the applicant remains dissatisfied with the reconsideration decision, then it is entitled to refer the matter to the Ombudsman pursuant to section 213 of the Act and the PPF Ombudsman Regulations.

27. That is what happened in this case: see paragraphs 5 to 6 above.

28. The process of review, reconsideration and referral to the Ombudsman is only available in respect of *"reviewable matters"*, which, as stated above, are those set out in Schedule 9 to the Act: see section 206(1). Under paragraph 19 of Schedule 9, the amount of a Levy determined under section 181(3)(b) is a reviewable matter. But the making of the Levy Determination under section 175(5) is not a reviewable matter.

29. It follows from this that, on an application for review (or a subsequent application for reconsideration or a referral to the Ombudsman), there is no scope for any challenge to the terms of the Levy Determination. The only legitimate question, in relation to a Schedule 9 paragraph 19 matter, is whether the Levy Determination has been properly applied in calculating the amount of the Levy.

30. It was common ground that the Board has no discretion to depart from the Levy Determination when it comes to calculate the Levy payable by an individual scheme under section 181(3)(b). By the same token, nor does the Board have

any such discretion if it is asked to review the amount of the Levy, and nor does the Reconsideration Committee or the Ombudsman. Further, the Ombudsman is only entitled to interfere with a decision of the Reconsideration Committee if the Reconsideration Committee did not reach its decision "correctly", and not merely because the Ombudsman might disagree with it: see Regulation 16 of the PPF Ombudsman Regulations.

Application of the 2010/11 Levy Determination to the Scheme – the Levy Calculation – and the nature of the Trustees' complaint

31. The material ground of complaint in relation to the Scheme's Levy Calculation was that the Failure Score for the Scheme employer was too low, and thus overstated its insolvency risk. The Trustees complained that this occurred because D&B (or its associated Luxembourg operation) had not taken account of the most up to date available financial statements for the Scheme Employer, a fact that was common ground by the time of the reference to the Ombudsman. The reason why it had not done so was that in Luxembourg, unlike in the United Kingdom, D&B's practice was not to obtain filed company accounts automatically. It would only do so if that was specifically requested by a client, which did not occur in this case. Otherwise, the accounts would not be taken into account unless provided to D&B, in practice by the company itself. D&B's stated reason for this practice was that, unlike in the UK, such data was not available electronically in Luxembourg in bulk feed format.

32. Mr Herberg, in his skeleton argument on behalf of the Trustees encapsulated the Trustees' position in these circumstances as follows:

> *"As D&B had itself conceded, the Trustees could not have been 'reasonably expected to know' that the D&B Luxembourg office did not collect such basic financial data – data which other D&B offices (including the UK) obtain without the need for action by the Trustees – particularly in circumstances where not only did the Board and D&B not warn trustees of this position, but where their publicly available material positively suggested the opposite.*"

33. Hence, the Trustees asked D&B, and then the Board under the review procedure, to recalculate the Levy using a D&B Failure Score which *"took into account the Scheme employer's financial statements which had been filed and were publicly available as at the Measurement Time."*

The Reconsideration Committee's decision

34. By its decision dated 23 September 2011 the Reconsideration Committee upheld the Levy Calculation.

35. Its reasoning was principally based upon its construction and application of Rules E2.2 and B2 of the 2010/11 Levy Determination and was contained in paragraphs 12 to 17 and 32 to 33 of its decision, the material parts of which I set out below.

> *"14. The failure score used in the Scheme's Levy calculation is therefore the failure score the Board was obliged to use under the terms of the [2010/11 Levy] Determination. A review cannot override the requirements to use the failure score set by D&B and any attempt to use any other measure of the Employer's risk of insolvency would be an impermissible departure from the rules set out in the [2010/11 Levy] Determination.*
>
> *15. The question of whether D&B's Luxembourg subsidiary should have automatically collected company financial reports from that country's company registry falls outside the scope of matters reviewable by the Board under section 207 of the Act. The [2010/11 Levy] Determination provides that the Board will use the scores set by D&B in the ordinary course of its business. Neither the [2010/11 Levy] Determination, nor any other rules or legislation, provide for the Board, once the [2010/11 Levy] Determination has been made for a levy year, to specify that D&B should take into account information that it would not normally take into account. The Board has no power whatsoever to retrospectively change the standard methodology applied by D&B at the measurement time of 31 March 2009.*
>
> *17. Clearly it would be impossible for the Board to assess the particular circumstances of every scheme and provide bespoke and subjective guidance to each of them on the exact way in which D&B's processes apply to them. The Board has always made clear that it uses standard failure score information supplied by D&B to calculate schemes' levies and has always encouraged schemes and employers to contact D&B directly to make sure that the information on which these failure scores are calculated is correct. It is for schemes and their advisers to assess how the rules in the [2010/11 Levy] Determination, including those relating to D&B failure scores, apply in their particular circumstances.*
>
> *…*
>
> *32. Under Rule B2, the Board has discretion to review the levies calculated in respect of a scheme where it subsequently appears to the Board that the*

information on which the calculation was based is incorrect in a material respect. Information is not incorrect for this purpose where it is correct and legitimate in itself but it would have been open to the person supplying it to supply some different or additional information which might have caused the [2010/11 Levy] Determination to be applied differently. Further, the Board is under no obligation to review the amount of the levies merely because a scheme has been disadvantaged by the failure of those acting on its behalf to supply correct information at the proper time.

33. The insolvency probability data used to calculate the Scheme's levy was based on the failure score assigned to the Employer by D&B in the ordinary course of its business, as required under Rule E2.2 of the [2010/11 Levy] Determination"

The Determination

36. Before the Ombudsman the Trustees put in issue a number of matters and sought a wide range of directions, summarised in paragraphs 21 to 26 of the Determination.

37. On the central point at issue (at least so far as this appeal is concerned[4]), namely the method of calculation of the Risk-based Levy, the Ombudsman recorded that her role was to consider whether the Reconsideration Committee's decision was *"not reached correctly"* (Regulation 16(2) of the PPF Ombudsman Regulations): see the opening sentence of paragraph 32. As already noted above, it would not have been open to the Ombudsman to overturn a decision of the Reconsideration Committee simply on the basis that she disagreed with the result arrived at by the Reconsideration Committee, provided that the decision had been arrived at by a correct process of reasoning. However, in the context of this particular case I think the Ombudsman was right to conclude in paragraph 32 that the question of whether the Reconsideration Committee's decision was *"not reached correctly"* translated into determining whether the Risk-based Levy was calculated in accordance with the 2010/11 Levy Determination.

[4] The Ombudsman was required to deal with another issue relating to the way in which the Board had dealt with the Scheme's certification of a contingent asset which does not arise on this appeal.

38. However, in paragraphs 34 to 36 she went on to describe the issue she was required to determine in a somewhat different way:

> *"34. The first [issue] centres on a lack of understanding by the trustees of D&B Luxembourg's particular requirements to have public company accounts submitted to them, in contrast to D&B in the UK who take account of public accounts. I acknowledge that responsibility lies with the trustees to submit correct data and I accept that the PPF depends on the information supplied to it.* ***There is therefore a balance to be struck in assessing where responsibility for the critical error might lie****. Essentially this involves consideration of whether the trustees failed to comply with D&B Luxembourg's requirements, having been told what they were, or the PPF failed to explain to the trustees that D&B Luxembourg did not collect financial information for PPF failure scores, instead requiring it to be submitted to D&B Luxembourg each year.*
>
> *35. D&B Luxembourg is clearly instructed by the PPF. D&B Luxembourg had obtained financial statements for previous years, apparently for a different client giving different instructions.* ***Therefore the question of what actions D&B Luxembourg took, or did not take, are within my remit as controlled by the PPF.***
>
> *36.* ***I am sure that the PPF would accept that it would not be a legitimate exercise of its powers to calculate a levy by unfair means*** *(and that* ***any interpretation of the [2010/11 Levy Determination] should be guided by this principle****). There is a risk of this if the PPF takes the view that it is, itself, strictly bound by the terms of the Determination and to the information it receives from D&B Luxembourg."*
>
> (emphasis added)

39. I pause there to observe that it seems, therefore, that the Ombudsman did appreciate that the central issue before her was one of the correct construction and application of the material terms of the 2010/11 Levy Determination, but that she considered that this construction/application process should be guided by the principle that it would not be a legitimate exercise of the Board's powers to calculate a Levy by *"unfair means"*. There is a hint here of the Ombudsman taking the sort of approach that one might expect to see adopted on an application for judicial review and, to that extent, I agree with Mr Giffin's observation in the second sentence of his skeleton argument at paragraph 44(iii). On this appeal, one of the main points of difference between the Board and the Trustees was the extent to which the construction of the material provisions of

the 2010/11 Levy Determination should be influenced by a consideration of how "procedurally fair" or "rational" the outcome would be of adopting each of the competing constructions.

40. Returning to the Determination, in paragraphs 38 to 44 and 48 the Ombudsman made a number of statements which, consistent with the passage quoted above, seem to indicate that she was approaching the issue as one of fairness or public policy. See, for example:

    (a) Paragraph 41: *"…the Trustees cannot reasonably be penalised because they failed to guess that D&B operates differently whilst working for the PPF in different countries when equally the PPF failed to advise about a critical variation"*. The variation to which she was referring was the variation in D&B's policy for obtaining up to date financial statements in Luxembourg as compared with its policy in the UK and in at least some other countries;

    (b) Paragraph 44: *"D&B agreed that the trustees could not reasonably be expected to know about its data collection policy in Luxembourg, but considered that it was for the trustees to find out. The PPF supported that view, but* ***I cannot see how a public body, properly directing itself, can decide that a statutory levy can be imposed based partly on a procedure that the levy payer was unaware of****"* (emphasis added);

    (c) Paragraph 48: *"It is not for me to say what the failure score should be, or what range it should fall in. But,* ***as a matter of public policy****, I cannot support the Board's insistence on using a failure score that it knows is not based on relevant data"* (emphasis added).

41. In paragraph 45, in reliance upon section 175(2)(a)(ii) of the Act, which requires the Levy to be assessed by reference to *"the likelihood of an insolvency event occurring in relation to the employer in relation to a scheme"*, the Ombudsman said, *"****So*** *the effect of applying the [2010/11 Levy Determination] should not be to produce an* ***incorrect*** *assessment of the employer's insolvency, based upon out of date financial statements, if alternatives exist"* (emphasis added). This, with respect, seems somewhat to beg the central question that ought to have been in the Ombudsman's mind when conducting her review, namely, on a proper construction of the provisions of the 2010/11 Levy Determination, how is the assessment of the employer's insolvency to be assessed and was it so assessed in the case of the Scheme for the year 2010/11?

42. In paragraph 46, the Ombudsman referred to the Reconsideration Committee's decision:

> *"In reviewing the amount of a levy, a number of factors may have to be considered, including D&B's failure score. Of course the PPF cannot interfere in D&B's calculations, but they can and do interfere in the way D&B operate for them.* ***It follows*** *that I do not agree with the [Reconsideration Committee's] view that the Board was prevented by Section 207 of the [Act] from considering the particular circumstances surrounding D&B Luxembourg's failure score here."* (emphasis added)

This appears to be a reference back to what the Reconsideration Committee said at paragraphs 14 and 15 of its decision (set out in paragraph 35 above). It is not easy to understand the Ombudsman's reasoning here, first because it is not clear what she meant when saying that *"[the PPF] can and do interfere in the way D&B operate for them"* and, second, because it is hard to see how it could follow from this observation (whatever it means) that the Reconsideration Committee's view that it could not consider the particular circumstances surrounding D&B Luxembourg's failure score for the Scheme was wrong. In fact, the Reconsideration Committee had given in the paragraphs of its decision set out above a reasoned analysis of why it was of the opinion that it could not review the Scheme's Failure Score in this case. That analysis is not addressed here in the Determination or elsewhere.

43. Next the Ombudsman turned to consider for the first time the meaning and effect of a material provision of the 2010/11 Levy Determination, namely Rule B2 (set out in paragraph 24(a) above). I note that, in paragraph 13 of the Determination, material parts of Rule B2 were set out in a list of provisions which were, so far as the Ombudsman was concerned, relevant to the reference before her. That list did not contain any reference to Rule E2, notwithstanding that this had formed an important part of the basis for the Reconsideration Committee's decision. In relation to Rule B2, the Ombudsman said in paragraph 47:

> *"Rule B2 of the Board's Determination allowed it to correct data if it appeared to the Board that information supplied for or used in the calculation of the levy was incorrect in a material respect.* ***D&B Luxembourg's failure score was incorrect in a material respect*** *– it was based on out of date*

financial statements that were irrelevant to the 2010/2011 levy year – and so was not 'correct and legitimate in itself'"

44. Having then made the observations in paragraph 48 already set out above (the first sentence of which appears to suggest that she did not think that she could substitute her own view of what the Scheme Employer's Failure Score ought to be for that of the Board), the Ombudsman's conclusion on the Failure Score issue appeared in paragraph 49 as follows:

"I therefore determine that the Reconsideration Committee's decision dated 23 September 2011 was not reached correctly. Having done so, Regulation 16 of the [the PPF Ombudsman Regulations] makes it mandatory for me to determine what action the Board should take and remit the matter to the Board"

As already referred to, an issue arises on this appeal as to whether, even if the Ombudsman was right that the Reconsideration Committee's decision was not reached correctly, the Ombudsman was right about the effect of Regulation 16. This is the Remission Issue referred to in paragraph 8(b) above.

45. The Ombudsman accordingly directed that:

"52. The Board shall, forthwith, review and recalculate the Scheme's [Risk Based Levy] for the 2010/11 year, based on D&B Luxembourg's [Failure Score] for [the Scheme Employer] for that [Levy] year, calculated on the basis of the financial statements issued by the company up to the measurement date used by D&B Luxembourg in accordance with Rule A2.3 of the [2010/11 Levy Determination], which was 5pm on 31 March 2009.

53. As I have remitted the matter to the Board, interest for late payment of the [Levy] shall not be charged."

Paragraph 53 of the Determination gives rise to the Interest Issue referred to in paragraph 8(d) above.

46. Finally, on the issue of costs, the Ombudsman set out her conclusions in paragraph 51 (set out in full in paragraph 171 below) and directed the PPF to contribute £10,000 to the Trustees' legal costs. This gives rise to the Costs Issues referred to in paragraph 8(e) above.

The Construction Issue

47. I have given the principal issue on the appeal this label because, in my judgment, the question of whether the Reconsideration Committee's decision was reached incorrectly (and in turn whether the Ombudsman correctly answered that question) turns on the construction of the terms of the 2010/11 Levy Determination. This is borne out by the "decision flowchart", an agreed document prepared by the parties following the hearing of the appeal, identifying what they say are the questions I need to answer at each stage in the process of arriving at various potential outcomes of the appeal. Question (1) on the decision flowchart, upon which all subsequent questions are consequential, is *"Whose construction of rule E2.2(3) is correct?"*.

48. Put another way, it is not disputed that, in undertaking the Levy Calculation, the Board was required to apply a pre-existing set of rules contained in the 2010/11 Levy Determination and that, unless it failed properly to do so as a matter of construction and application of those rules, this appeal must fail regardless of what might or might not be said about the appropriateness of some of the rules in the Levy Determination from a "policy" or "fairness" or any other perspective. As already noted in paragraphs 28 to 29 above, the terms of an annual Levy Determination is not open to challenge in these proceedings. Any such challenge would have to be undertaken by judicial review brought by a person with appropriate standing.

49. The Construction Issue sub-divides into the following questions:

    (a) What is the correct construction of Rule E2.2(3) of the 2010/11 Levy Determination? In particular, was the failure score in fact ascribed to the Scheme by D&B Luxembourg for 2010/11 *"the normal non-UK failure score that was assigned to [the Scheme's Employer] by [D&B Luxembourg] in the ordinary course of its businesses at the Measurement Time"*.

    (b) What is the correct construction of Rule B2 of the 2010/11 Levy Determination? In particular, was information supplied for or used in the calculation of the Scheme's Risk-based Levy "incorrect in a material respect" so at to engage the Rule B2 discretion?

Background matters relied on by the Trustees – inter-relationship with the Board's public law duties not to delegate its discretion to a third party and to act fairly and rationally; the Ombudsman's role

50. Before turning to the textual construction arguments relied on by the parties in relation to each of Rule E2.2(3) and B2, it is appropriate to deal first with a more generic construction argument deployed by the Trustees based upon background matters that they say should inform the construction of each of the material provisions.

51. By way of introduction to this point, it is important to note that the Trustees do not argue that the Board has a discretion to depart from the 2010/11 Levy Determination. Rather, they argue that, on a proper construction of the terms of the 2010/11 Levy Determination, a sufficient element of discretion is (indeed must be) given to the Board thereunder to have permitted the Board to correct the failure score provided by D&B in respect of the Scheme for 2010/11.

52. The Trustees rely on two specific points of admissible background. They say that the outcome on the Construction Issue contended for by the Board would (a) be inconsistent with the statutory scheme and (b) effectively *"emasculate the role of the Ombudsman, rendering him or her no more than a verifier of a mechanistic calculation"* (see paragraph 8 of Mr Herberg's skeleton argument).

53. The Trustees' argument that the outcome contended for by the Board would be inconsistent with the statutory scheme is based upon the (correct) submission that, pursuant to section 175(1) and (2) of the Act, the Board must impose a Risk-based Levy which is to be assessed by reference to, amongst other things, *"the likelihood of an insolvency event occurring in relation to the employer in relation to a scheme"* (section 175(2)(a)(ii) of the Act). The argument is that, at both the "first stage" (of determining, in the annual Levy Determination, *"the factors by reference to which the [Risk-based Levy] is to be assessed"* pursuant to section 175(5) of the Act) and the "second stage" (of applying those factors in the case of a particular pension scheme so as to produce that scheme's annual Risk-based Levy pursuant to section 181(3)(b) of the Act) the statutory role and responsibility to impose a Risk-based Levy which complies with section 175(2)(a)(ii) is cast upon the Board.

54. The Trustees go on to argue that what this means is that the Board cannot *"entirely ... abdicate its power to ensure that the process of calculation of the [Risk-based Levy] was **fair and rational**, by placing everything save mechanical calculation in the hands of a commercial third party provider"* (emphasis added), because this would be an unlawful delegation or abdication of the Board's discretion, and that *"it is for the Board, not for a third party provider acting purely for self-interested commercial reasons, to **comply with public law obligations of fairness and rationality** in determining scheme levies. It cannot do so if it delegates to D&B, without any possibility of effective review or control, the substantive calculation of the [Risk-based Levy]"* (emphasis added) (see paragraph 11 of Mr Herberg's skeleton argument).

55. Consequently, the Trustees argue that the Levy Determination must be interpreted in a way that results in the Board retaining the power thereunder to intervene to prevent or correct a *"procedurally unfair or irrational [Risk-based Levy]"* and that their interpretation achieves this result, whereas that of the Board does not. The procedural unfairness relied upon by the Trustees in this case was not that D&B Luxembourg did not routinely obtain (and therefore take into account) the most up to date filed accounts of Luxembourg registered scheme employers. Rather the procedural unfairness arose out of the fact that scheme trustees were not informed that this was the D&B practice in Luxembourg. The Trustees assert that they could not reasonably have known that the filed accounts would not be taken into account; indeed they say that they were positively led to believe the opposite.

56. The Trustees' additional argument that the outcome contended for by the Board would emasculate the role not only of the Board but also that of the Ombudsman is based upon the contention that the Board's characterisation of its role at the "second stage" of the Levy Calculation pursuant to section 181(3)(b) would have the consequence that the Ombudsman's role would be *"relegated"* to checking the Board's mechanistic calculation so as to become, effectively, *"an arithmetic re-checker"*. They argue that this would leave in D&B's hands issues relating to the fairness and rationality of the decision as to the Failure Score, which is wrong as a matter of principle (for the reasons set out in the previous two paragraphs of this judgment) and also because *"given D&B's*

commercial and self-interested standpoint it patently cannot be relied upon to safeguard the procedural fairness or rationality of the levy calculation process".

57. In seeking to make good these arguments, Mr Herberg adapted and relied on the classic example of unreasonableness posed by Lord Greene MR in *Associated Provincial Picture Houses v. Wednesbury Corp* [1948] 1 KB 223) by positing a hypothetical and extreme example in which D&B Luxembourg's normal course of business was to downgrade the Failure Score in respect of any pension scheme whose trustee representatives had red hair. He argued that, on the Board's interpretation, neither the Board nor the Ombudsman could interfere with the Board's Levy Calculation even in these circumstances.

58. In my judgment, these arguments are misplaced. The fallacy in them is that they fail to distinguish properly between the discretionary "first stage" (when determining *"the factors by reference to which the [Risk-based Levy] is to be assessed"* pursuant to section 175(5) of the Act) and the non-discretionary "second stage" (when applying those factors in the case of a particular pension scheme so as to produce that scheme's annual Risk-based Levy pursuant to section 181(3)(b) of the Act).

59. I agree with the following propositions in substance put forward by Mr Giffin:

    (a) First, at the section 175(5) discretionary stage, the Board did not delegate its statutory discretion to anybody. It and it alone exercised that power when laying down in the 2010/11 Levy Determination the manner in which, amongst other things, the Risk-Based Levy would be calculated. In doing so it decided that it would use the *"normal"* Failure Scores assigned by D&B *"in the ordinary course of its business"* (or that of its *"relevant associated undertaking"* where the scheme employer is foreign based).

    (b) Second, in the exercise of that power, the Board was entitled to make that decision or, even if it was not (e.g. because in so doing the Board either unlawfully delegated its discretion or acted itself in a procedurally unfair or irrational manner) any challenge to such a decision would have to be made by way of judicial review, for the reasons already set out above. In particular, to the extent that, in so doing, the Board laid down "hard-edged"

rules for the section 181(3)(b) "second stage" which did not permit the Board to interfere in any individual case so as to procure what might be said to be a "fair" or "rational" result, that is of no assistance to the Trustees because this was (a) permitted by the scope of the section 175(5) power and (b) in any event, not a matter which is susceptible to review by the Ombudsman for that reason.

(c) Third, once those "hard-edged" rules have been promulgated without being challenged successfully on judicial review they must be applied strictly according to their terms: if, on a true construction, they do not permit of any discretion then none should be read into them as a matter of construction simply in order to prevent there being any delegation of discretion to a third party or to enable the statutory body to make a "merits-based" decision in each individual case (e.g. one which might be based upon concepts of fairness in the individual case) rather than the decision that would follow from a strict reading of the relevant rule.

(d) Fourth, the scope of the Ombudsman's power cannot be any broader than that of the Board. Hence, if the "hard-edged" rules lawfully promulgated by the Board under section 175(5) do not permit the Board to interfere in any individual case so as to procure what might be said to be a "fair" or "rational" result, the Ombudsman is similarly constrained on a reference relating to a reviewable matter and cannot interfere in such circumstances. This does not "emasculate" the Ombudsman's jurisdiction. The Ombudsman is permitted by Schedule 9 of the Act to review a wide range of matters. Furthermore, even in the case of a review of a "second stage" decision by the Board under section 181(3)(b), the Ombudsman has a function, similar to that of the Board, of being able to review whether the Failure Score has been correctly arrived at pursuant to Rule E2.2(3) in the sense of being the *"normal"* Failure Score arrived at by D&B *"in the ordinary course of its businesses"*.

60. In argument Mr Giffin sought to support the first three of these propositions by reference to the Divisional Court decision in *Security Industry Authority v Stewart* [2009] 1 WLR 466 ("***Stewart***"), in which judicial review challenges had

been brought by four nightclub door supervisors against decisions of the Security Industry Authority ("**SIA**"). The SIA had decided not to grant them licences to work as door supervisors because, under criteria set out by the SIA pursuant to section 7 of the Private Security Industry Act 2001 ("**PSIA 2001**"), which the SIA was required by section 8(3) to apply in determining whether to grant a licence, each applicant was disqualified by virtue of an earlier conviction of a criminal offence falling within a particular category. In each case one of the issues was whether, on an appeal under section 11 of the PSIA 2001, the court could consider the merits by looking into the circumstances of the applicant's conviction. The Divisional Court held that it could not. The PSIA 2001 conferred no discretion on the SIA when considering whether to grant a licence, or on courts hearing appeals under section 11. The criteria laid down under the SIA's power conferred by section 7 were rules and not guidelines, and the PSIA 2001 did not authorise any disapplication of them, or qualification of their effect, by reference to the applicant's underlying merits or individual circumstances (on the contrary, section 8(3) was mandatory in its terms: *"in determining whether or not to grant a licence the Authority shall apply the criteria for the time being applicable under section 7"*). Furthermore, the criteria could not be said to be *ultra vires* the PSIA 2001, in the sense of amounting to an unlawful fetter on the SIA's discretionary power of decision, given a legislative intention to authorise the making of hard-edged rules which would automatically disqualify applicants who had been convicted of defined offences, within a defined timescale, and the impracticality of requiring the scheme to be operated by reference to the merits of individual cases.

61. The key part of the judgment of Laws LJ (with which Mitting J agreed) relied upon by Mr Giffin appears at paragraph 34:

> *"**The third ground of challenge before the deputy judge was**, as he observed, closely related to the second. It was **that the criteria, since they constituted absolute rules, amounted to an unlawful fetter on the SIA's discretionary power of decision**. Reliance was placed on Lord Reid's well known statement in British Oxygen Co Ltd v Board of Trade [1971] AC 610, 625:*
>
> > *'The general rule is that anyone who has to exercise a statutory discretion must not "shut [his] ears to the application" . . . What the authority must not do is to refuse to listen at all.'*

> *This argument was misconceived and the deputy judge was plainly right ...* ***Once the criteria were set, the SIA did not have to 'exercise a statutory discretion': in applying the criteria, it had no discretion****.* ***The British Oxygen case is not authority for the proposition that Parliament may not authorise the promulgation of an automatic prohibition or rule of disbarment****. Such a proposition would be an affront to Parliament's legislative supremacy. And* ***on the true construction of section 7 of the 2001 Act Parliament has in fact authorised just such prohibitions****. On this part of the case it is useful to compare the decision of the Court of Appeal in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213, in which it was held that the formulation of 'bright line criteria' for a compensation scheme did not amount to an unlawful fetter of common law prerogative powers…"* (emphasis added)

62. Mr Giffin argues that this case is very closely analogous to *Stewart*. In *Stewart*, there was a statutory duty under section 7 of the PSIA 2001 to prepare and publish the criteria which the SIA proposed to apply in determining whether or not to grant a licence. This, he argues, is similar in effect to the duty on the Board in this case imposed by section 175(5) of the Act. Having published those criteria, the SIA was then under a similar duty under section 8(3) of the PSIA 2001 to that imposed on the Board by section 181(3)(b) of the Act. What the SIA did in *Stewart* for practical reasons was to choose under section 7 to make a hard-edged rule, whose application under section 8(3) was mechanistic. This is the same as in this case. What Laws LJ said [34] – *"Once the criteria were set, the SIA did not have to 'exercise a statutory discretion': in applying the criteria, it had no discretion"* – could equally well apply to this case.

63. So, Mr Giffin argues, in this case, as in *Stewart*, there was no unlawful delegation of the relevant discretion, because in each case that discretion was exercised exclusively by the statutory body.

64. Similarly, when considering whether the exercise of the section 175(5) discretion by the Board, or the section 7 discretion by the SIA, was unlawful on the grounds of procedural unfairness or irrationality/*Wednesbury* unreasonableness (not a question which should arise on a reference to the Ombudsman of a "reviewable matter"), in *Stewart* the SIA did not act unlawfully simply because the application of the criteria laid down under section 7 might in some cases have led to results which might have been regarded as irrational if they had been free-standing discretionary decisions. At

first instance in *Stewart*, the Recorder concluded that the barring of the nightclub door supervisor for having a very minor conviction on his record was a "*Wednesbury* unreasonable" result. On appeal, the Court of Appeal did not dissent from that characterisation but still found in favour of the SIA on the basis that it had been entitled to lay down a strict rule and apply it. The position in this case is effectively the same, Mr Giffin argues.

65. The other case relied on by Mr Giffin in this part of his argument was *The Audit Commission for England and Wales v Ealing LBC* [2005] EWCA Civ 556 ("***Ealing***"), which concerned the way in which the Audit Commission exercised its powers under section 99 of the Local Government Act 2003 ("**the 2003 Act**") to categorise the performance of local authorities. Section 99 provides:

> *"(1) The Audit Commission must from time to time produce a report on its findings in relation to the performance of English local authorities in exercising their functions.*
> *(2) A report under sub-section (1) must (in particular) categorise each English local authority to which the report relates according to how the authority has performed in exercising its functions."*

66. Pursuant to that statutory duty the Audit Commission categorised the performance of Ealing London Borough Council ("**Ealing**") as "weak" (the range comprising "excellent", "good", "fair", "weak" and "poor"). Ealing challenged that characterisation by bringing a claim for judicial review and succeeded at first instance on the basis that the Audit Commission had acted unlawfully by adopting a rule which automatically downgraded a local authority which had received a zero rating in respect of its social services performance from another statutory body, the Commission for Social Care Inspection ("**CSCI**"). The way in which, pursuant to its statutory duty, the Audit Commission had determined the categorisation system would work, and in particular the effect under its rules that receipt of a zero star rating from the CSCI would have on a local authority's overall score (even if otherwise, as in the case of Ealing, it would have been categorised as "fair" or "good" overall) resulted in Ealing receiving its "weak" categorisation. This was a consequence of the Audit Commission's "Rule 2" which provided that a local authority could

not attain a "fair" rating unless it got at least a one star rating in each of three categories, one of which was for its social services.

67. At paragraph 14 of the judgment of the Court (Lord Phillips MR and Latham and Keene LJJ), Keene LJ encapsulated the issue before the first instance judge and on the appeal:

> *"The principal ground of challenge was that the Audit Commission had fettered its powers and accepted dictation from an outside body in applying a pre-determined rule, without allowing for the possibility of exceptions to that rule. As a result, the Audit Commission acted ultra vires, since the power to categorise a local authority's performance was one vested by Parliament in the Audit Commission. It is important to note that it was the use made of the star rating to which Ealing objected, not the CSCI conclusions as to an authority's performance which underlay the star rating. As recorded in Walker J's judgment at paragraph 23,*
>
> > *'Thus Ealing's position was that the Audit Commission could adopt the "findings" of CSCI because they were objective findings, but the CSCI rating was different in that it was a value judgment. Ealing did not say that CSCI could not assist the Audit Commission: the latter could use the product of CSCI's investigative work in the same way as it could use the product of its own employees' investigative work.'*
>
> *But to have a rule that a star rating could determine the outcome of an Audit Commission CPA categorisation process meant that that Commission had subordinated its own decision-making function to that of the CSCI."*

68. The Audit Commission's argument on appeal was that *"where a rule reflects a prior judgment by the Commission, there is nothing unlawful about having such a rule in absolute terms, so long as it is a rational one"* (see paragraph 18 of the judgment). It argued that its task was to *"devise an overall system of categorisation, which it has done, using to a considerable extent the work of more specialist bodies but making its own decision as to how such work should feed in to producing the final result"*.

69. The Court of Appeal dealt with this argument in paragraphs 24 to 27 of its judgment:

> *24. There is no doubting the principle [that a body given a statutory power by Parliament must exercise that power itself and not delegate its exercise to another] is well established in administrative law, which is supported by other authority. The real issue is whether the Audit Commission's approach as set out in rule 2 offends against the principle. It is conceded by Ealing that the*

Audit Commission is entitled to adopt the professional judgments of the CSCI … as its own. That is an understandable concession, since the CSCI is the inspectorate specialising in the assessment of local authorities' social care performance. It would be absurd for the Audit Commission to have to re-assess all those findings itself, and that cannot have been Parliament's intention.

25. But Mr Arden is right that the star ratings then derived from those so-called "scores" reflect certain weightings arrived at by the CSCI, in particular as between current performance and the capacity for improvement. Those weightings must reflect a view taken by the CSCI about the relative importance of current performance and the capacity for improvement in each aspect being assessed. Rule 2 undoubtedly gives to the star ratings a powerful role in the Audit Commission's overall CPA categorisation of an authority. It means that, however well an authority performs in its core services, it cannot be categorised as anything other than "poor" or "weak" if it gets a zero star rating for its social services. That in turn has significant practical implications for the authority.

26. ***Does this mean that the Audit Commission has unlawfully delegated its section 99 decision to the CSCI? On reflection we have concluded that it does not****. The matrix which embodied these weightings or trade-offs was publicly available in the SSI/CSCI Operating Policies document and it must be the case that the Audit Commission was familiar with it and with the weightings attached to the various "scores" on the two axes. The Audit Commission must be taken to have been content with those weightings and to have adopted them. This is not a case where the CSCI made its own separate judgments from time to time about the star rating of an individual authority. The star ratings follow automatically from the "scores", to which Ealing takes no objection. It is a mechanical exercise, once one has the scores and the matrix. As the witness statement of Joanna Elizabeth Killion, Director of Performance and Improvement at the Audit Commission, puts it at paragraph 4(c):*

> *"... the social services star rating is not based on the subjective judgment of the Chief Inspector, but is arrived at by the application of a set of transparent and objective rules to those judgments. There is no discretion involved in translating those judgments into a star rating."*

27. This is, therefore, a very different case from Lavender. There the relevant Minister's policy was to allow his decision to be dictated by what another Minister decided in any individual case. ***Here the Audit Commission has in effect adopted as its own a series of weightings, produced by the CSCI, which result in a star rating in an entirely predictable way. In our view it is entitled to do that. It is not delegating its decision in any individual case to***

the CSCI, since the CSCI does not make any such individual decision once it has arrived at the "scores". It is simply that the Audit Commission has itself decided to adopt certain principles for achieving its categorisation."

(emphasis added)

70. The Court of Appeal therefore concluded that the Audit Commission's policy embodied in rule 2 did not constitute any unlawful delegation of its decision-making power under section 99 of the 2003 Act and allowed the Audit Commission's appeal.

71. Mr Giffin also argues that this case is analogous to *Ealing* in that, in that case, the exercise of discretion by the Audit Commission (which the Court of Appeal held had not been unlawfully delegated) was to apply the principles laid down by it pursuant to its decision-making power under section 99 of the 2003 Act, even though these principles were inflexible and admitted of no exceptions.

72. Mr Herberg argues that there are material distinctions between the facts of this case and those in *Stewart* and *Ealing*.

73. In relation to *Stewart* he relies on the fact that, in that case, the criteria which the nightclub supervisors sought to challenge were devised, adopted and applied by the very statutory body given the power to do so under section PSIA 2001; so there was no purported delegation by the SIA of any part of its statutory powers. In contrast, in this case, part of the process of calculating the Risk-based Levy was contracted out to a commercial third party and, Mr Herberg argues, the Act does not authorise any form of delegation of public law obligations still less to a commercial body. Parliament can authorise a delegation but it has not done so here. Also, it can authorise the making of "automatic" or "rigid" rules, as in fact occurred in *Stewart*, which is not a case of authorised delegation to a third party, but rather a case of Parliament effectively authorising a statutory body to fetter its discretion in an individual case so as to permit only one outcome on a given set of facts.

74. In relation to *Ealing* Mr Herberg relies in particular on the fact that, in that case, there was no delegation of authority at all by the Audit Commission, as it was aware of and approved of the weightings produced by the CSCI and the star ratings flowed automatically. However, he points out that, in this case, the D&B

approach to the assessment of Failure Scores was not approved in advance; indeed it is not even clear that the Board was aware of the Luxembourg approach. As a result, he argues, this is a case where the decision in an individual case (the calculation of the Risk-Based Levy based upon the Failure Score assigned by D&B Luxembourg) was dictated to the Board by another body, in breach of the well-recognised principle that a body given a statutory power by Parliament must exercise that power itself and not delegate its exercise to another.

75. Mr Herberg also argues that there is a separate point of distinction between the facts in *Ealing* and this case in that, in *Ealing*, the body which was taking the primary decision, CSCI, was a public body itself, whereas in this case the equivalent decision maker, D&B was a commercial provider and the Board cannot be satisfied that D&B will act in accordance with public law values.

76. He therefore maintains that, if the Board's construction of the Levy Determination were correct, what would result would be a mechanistic approach to the Calculation which would amount to an unlawful delegation of the Board's discretion to D&B because the Board would not be retaining any power to depart from D&B's calculation. This, he says, cannot be correct because, otherwise, the Board would be obliged to rely on any Failure Score which was reached unfairly or irrationally by D&B (whether in an extreme case, such as Mr Herberg's red-haired trustee example, or in a more moderate case of procedural unfairness or irrationality), which of itself must mean that there has been an unlawful delegation of discretion.

77. I agree that it is possible to make some of the factual distinctions Mr Herberg seeks to draw. However, particularly in the case of a comparison between the facts of this case and those in *Stewart*, the distinctions are not materially significant, whereas I accept the significance of the parallels Mr Giffin seeks to draw: see paragraphs 62-64 and 71 above. Furthermore, any such distinctions do not, in my view, lead to the result contended for by Mr Herberg. In particular, his reasoning summarised in paragraph 76 above fails to differentiate between the point in time when the Board had a discretion to exercise under section 175(5) (which is not a reviewable matter under Schedule 9 of the Act) and the

point in time when the Board was simply applying under section 181(3)(b) the rules already laid down by it during the previous exercise of its discretion (which is a reviewable matter).

78. For these reasons, as already indicated, I agree with the propositions in substance advanced by Mr Giffin as set out in paragraph 59 above.

79. This essentially means that Rules E2.2(3) and B2 must be construed without that process being influenced by the background matters relied upon by the Trustees.

Construction of Rule E2.2(3)

(i) The Board's arguments

80. The Board argues that, provided that the Failure Score ascribed to a pension scheme by D&B or, in the case of a scheme employer to which D&B cannot assign a UK Failure Score (because it is foreign-based), by D&B's *"relevant associated undertaking"* (in this case D&B Luxembourg), is, as a matter of fact, the normal non-UK Failure Score assigned to the employer in the ordinary course of D&B's or the associated undertaking's (as material) business, then that Failure Score is a "given" from which the Board (and the Ombudsman pursuant to the referral jurisdiction in respect of a reviewable matter) is not entitled to depart on any other ground than the limited and narrow (and, on the facts of this case, inapplicable) grounds specified elsewhere in the Rules, for example in Rules E2.3, E3.5 and B2.

81. On this approach to the construction of Rule E2.2(3), once the factual question identified in the previous paragraph has been established on any review of the Levy Calculation by the Board or the Ombudsman, that is the end of the inquiry on that review. Issues of fairness and irrationality, or indeed any form of value judgment about the appropriateness of the practice adopted by D&B in the ordinary course of business, do not come into it at this second stage in the process of producing a Risk-based Levy for the Scheme. Rather, if such issues were relevant at any stage, it would be at the first stage, on an application for judicial review challenging the lawfulness of part or all of the provisions of the annual Levy Determination.

82. The Board also relied on the following further points in support of its construction of Rule E2.2(3), as developed in the oral argument of Mr Giffin.

83. First, the alternative construction put forward by the Trustees is inconsistent with the commercial background against which the 2010/11 Levy Determination (and indeed each of the annual Levy Determinations before and since) was promulgated, as described in the evidence of Mr Collins, the Board's Chief Policy Advisor, and would have a commercially absurd result. In particular, he relied on the fact that, in exercising its discretion under section 175(5) of the Act to determine that the Risk-based Levy would be calculated using *"normal"* Failure Scores assigned by D&B *"in the ordinary course of [its] business"*, the Board was legitimately deciding to purchase an existing and already widely used "off the shelf" service (subject to some limited modifications) from a third party commercial provider with the necessary expertise, expertise which the Board does not possess. The importation of considerations of fairness or reasonableness into the process of answering the question whether the Failure Score was D&B's *"normal"* Failure Score assigned *"in the ordinary course of [its] business"* would require the Board on a review or reconsideration of D&B's Failure Score to undertake a task which it is not qualified to undertake and which would also potentially clog up the review system in that it would involve having to go into a debate about the reasonableness or otherwise of D&B's commercial practice in any case where the scheme trustees sought a review on this ground. Against this commercial background, Mr Giffin argued that it is not plausible to construe the words used in Rule E2.2(3) as having been intended to open up that kind of debate in any individual review.

84. Second, the words *"normal"* and *"ordinary course of business"* are simply not capable of bearing the meaning which the Trustees seek to place on them. Their ordinary and natural meanings do not connote any form of value judgment about the way D&B ought to be doing things; rather they indicate the need to undertake a straightforward factual enquiry as to whether or not D&B's normal practice has been followed. If Rule E2.2(3) had been intended to define the Failure Score as one which had been " appropriately" or "fairly" assigned it would have said so.

85. Third, the purely factual nature of the inquiry required to be undertaken to establish whether Rule E2.2(3) has been complied with is reinforced by the terms of Rule E3.5 (set out in full and in context in paragraph 24(c) above). This makes it clear that, in the context of the D&B appeal process, following the receipt of representations from scheme trustees, a scheme employer or the Board about, amongst other things, a Failure Score assigned by it, D&B may only use its discretion under Rule E3.3 to decide that the Failure Score was *"incorrect"* if it was *"incorrect or incomplete by comparison with the information which should normally have been taken into account by DBUK in assigning a Failure Score or other measure at that date"*. Mr Giffin's point was that it would seem anomalous if an appeal to the body that had assigned the Failure Score could only be successful on the relatively narrow ground that, as a matter of fact, it had not been based on information which would "normally" have been taken into account by D&B, whereas a broader ground of challenge, based on the "fairness" or "reasonableness" of the Failure Score were available on any review or reconsideration of the Failure Score by the Board under section 207 of the Act and Regulations 2 and 14 of the Pension Protection Fund (Review and Reconsideration of Reviewable Matters) Regulations 2005.

86. Fourth, Mr Giffin argued that support for his construction of the words *"ordinary course of business"* can be found in the judgment of Etherton J in *Ashborder BV v Green Gas Power Ltd* [2005] 1 BCLC 623, a case about the construction of a provision in a floating charge. He relied, in particular, on [192] and [227]. The material parts of [227] are set out below in paragraph 93 of this judgment. At [192] Etherton J stated as follows:

> *"The proper starting point is that the words in the expression 'ordinary course of its... business' are ordinary words of the English language which must be given the meaning which ordinary business people in the position of the parties to the facility agreement and the debentures would be expected to give them against the factual and commercial background in which those documents were made."*

87. Mr Giffin's submission was that, at no point in Etherton J's judgment was there any suggestion that an assessment of whether some act or activity is undertaken "in the ordinary course of business" connotes some sort of judgment about

whether what the company has done is objectively sensible or appropriate or reasonable. In other words, he says, to go outside the ordinary course of business requires something rather more than disagreement with the way the business is run.

88. Fifth, the Board relies in support of its specific argument that, once the Failure Score is shown to have been the *"normal"* Failure Score assigned by D&B *"in the ordinary course of business"*, the Board has no discretion under Rule E2.2(3) to adopt a different Failure Score, on the decision of the Scottish Court of Session (First Division, Inner House) in *Trustees of the Lithgows Ltd Pension Scheme v Board of the Pension Protection Fund* [2011] SLT 380 (referred to throughout submissions as *Re Currie*) and, in particular, on a passage at [19] where the Lord President said:

> *"It is clear that section 175(5) of the 2004 Act prescribes that, before the beginning of each financial year, the Board must determine certain matters. These include 'the factors by reference to which the pension protection levies are to be assessed'. There is no mechanism under the statute for review of such a determination. ... The [Levy Determination] is a detailed document, Part 3 of which is concerned specifically with the risk-based levy. Within that part are provisions concerned with the insolvency probability associated with an employer, including the use of a 'Failure Score'. It is prescribed that the failure scores to be provided (by Dun & Bradstreet) to the Board 'are to be the normal failure scores which were or would have been assigned to that employer by DBUK in the ordinary course of business ...'.* ***That provision, which was capable of being applied to individual employers in the light of the relevant data at the relevant time, is clearly an integral part of the determination. As such it is not a reviewable matter under the statute. There is no provision for departing, on a discretionary or other basis, from the normal failure score.*** *The calculation of the levy, which is a reviewable matter, proceeds on the basis of the assigned normal failure score, subject only to any correction made and intimated by DBUK. It is not disputed that the normal failure score assigned to Ormsary Farmers by Dun & Bradstreet in the ordinary course of its business (and not departed from by it) was 69.* ***A challenge to the use of the normal failure score assigned to a particular employer is in effect a challenge to an integral part of the [Levy Determination]. Such a challenge cannot legitimately be made by a challenge to the calculation of the levy. In these circumstances it is clear, in our view, that the mechanism used by the appellants to challenge the failure score assigned to Ormsary Farmers is misconceived and that the appeal is on that basis also without foundation.*** *It is unnecessary in these*

circumstances to express a view on the effect, if any, of section 6(2) of the Human Rights Act."

89. Sixth, Mr Giffin relied on that the fact that, prior to the 2010/11 Levy Determination being drafted and published, there had been decisions of the Ombudsman in relation to previous annual Levy Determinations where the same wording had been used in the equivalent to Rule E2.2(3). In these decisions it was held that *"ordinary course of business"* has the meaning for which the Board now contends in relation to the same wording in the 2010/11 Levy Determination. Given that it was drafted against the factual background of those earlier decisions, he argues that this background should be taken into account in construing those words in the 2010/11 Levy Determination. In other words, viewed objectively as a matter of construction the Board should be taken to have used those words in the 2010/11 Levy Determination so as to convey the same meaning as they had previously been held to convey.

90. Finally, Mr Giffin relied on the contents of the Board's public consultation document that was published before the 2010/11 Levy Determination, on the basis that what the Board said in the consultation document about its view of the scope of the review process was consistent with the meaning of the words *"ordinary course of business"* for which he contends and is thus a legitimate aid to construction of those words in the 2010/11 Levy Determination. However, when I pushed him on this line of argument, he conceded that this was not his best point (a concession with which I agree) and I do not propose to say anything more about it.

(ii) The Trustees' arguments

91. The Trustees' construction argument in relation to Rule E2.2(3) is that, having regard to the background matters already referred to above, the words *"normal"* and *"ordinary course of business"* in Rule E2.2(3) *"cannot sensibly be interpreted mechanistically to mean 'whatever D&B Luxembourg usually do'"*. Hence it is further argued that:

*"A 'normal' failure score provided in the 'ordinary course of business' must contain an **objective element**, so as to be a score which is the product of a proper and customary, as well as merely a regularly carried out, procedure. At a minimum, in order to ensure that the Board is not making a decision as to*

the risk-based levy which is irrational or procedurally flawed, ***it must be satisfied*** *(where objection is taken)* ***that the score does not suffer from a defect in its genesis or computation such that its adoption would be unfair or irrational****"* (emphasis added).

92. By this route the Trustees were able to contend that the Ombudsman's conclusion was correct because the Reconsideration Committee had misunderstood the extent of the Board's power of reconsideration pursuant to the Levy Determination in interpreting the second stage of the process of arriving at a Risk-based Levy for the Scheme as being *"essentially mechanical"*, whereas assessment of the Failure Score under Rule E.2.2(3) involves the exercise of a discretion (at least where the initial decision is challenged) on the part of the Board to ensure that an unfair or irrational result is not achieved.

93. In his oral argument, Mr Herberg (like Mr Giffin) relied on parts of the judgment of Etherton J in *Ashborder* to support his argument that the question of whether something is done *"in the ordinary course of business"* is to be answered by applying at least an element of objectivity: it is not just a question of whether what was done was a "normal" or "regular" or even "standard" activity of the entity concerned, but also whether, viewed objectively, what was done was "proper" (by which, in the context of this case, he meant "procedurally fair" and "rational"). In particular he relied on the following passage in [227] of the judgment:

"It is convenient to approach the matter in a two-stage process; (3) first, to ascertain, as a matter of fact, whether an objective observer, with knowledge of the company, its memorandum of association and its business, would view the transaction as having taken place in the ordinary course of its business"

94. In addition, Mr Herberg relied on the following passage in [216] of the judgment, in which Etherton J was recording (with approval as the subsequent passage in [227] set out above appears to demonstrate) a statement in the judgment of the Privy Council (given by Gault J) in *Countrywide Banking Corporation Ltd v Dean* [1998] A.C. 338:

"[Gault J] further observed that the determination is to be made objectively by reference to the standard of what amounts to the ordinary course of business. It must be such that it would be viewed by an objective observer as

having taken place in the ordinary course of business"

95. The Trustees sought to make an additional argument based upon one of the terms of the "Service Level Agreement" between the Board and D&B, which I was told governed the provision of services (including the Failure Scores) to the Board by D&B. The term relied upon was set out in correspondence between the Trustees' solicitors and the office of the Ombudsman and reads:

> "*The contract between the PPF and D&B states that D&B is required to deliver the Services in accordance with Good Industry Practice which is defined as exercising the skill, care, diligence, prudence, foresight and judgement as would be expected from a skilled and experienced person carrying out the same function"*.

96. The Trustees' argument based upon this contractual term was that D&B or D&B Luxembourg must have been in breach of the duty set out if, in arriving at a Failure Score or in reconsidering it as part of its internal appeals process, it failed properly to take account of whether the Trustees could fairly and reasonably have been expected to provide published and filed accounts directly to D&B Luxembourg. If the Trustees could not fairly and reasonably have been expected to do so, it was argued, then it could not be fair or proper for D&B, acting in the ordinary course of its business, to refuse to consider the published and filed accounts in reconsidering the failure score.

97. As I understood it, this argument was intended to support the Trustees' main point that the Failure Score ascribed to the Scheme Employer by D&B Luxembourg should not be regarded as being *"normal"* or provided *"in the ordinary course of business"* where it had been provided in breach of D&B's contractual duty to the Board.

98. Alternatively, the Trustees appeared to be relying on the fact that D&B owed the Board the contractual duty referred to as a further reason to conclude that the Board must have a power when assigning a Failure Score to a scheme employer to enquire into the process by which D&B produced the Failure Score, which is the Trustees' central contention on this part of the appeal: see paragraphs 91 and 92 above.

99. As to the judgment of the Court of Session in *Trustees of the Lithgows Ltd Pension Scheme v Board of the Pension Protection Fund*, the Trustees argue that the passage relied upon by the Board was *obiter* but that, in any event, that case is manifestly distinguishable from this case on two grounds.

100. First, it is distinguishable on the facts, because, in *Trustees of the Lithgows Ltd Pension Scheme v Board of the Pension Protection Fund*, the scheme employer was expressly made aware that up to date accounts were required in order for D&B to take them into account in deriving the Failure Score. The scheme employer positively refused to file the accounts, on the basis that this would render them publicly available (through being fed into the publicly available D&B database), which it argued would be in breach of its Article 8 rights. The Trustees characterise this as

> *"a clear and obvious attack on the fairness of the Levy Determination, which imposed the system which meant that accounts supplied would be rendered publicly available. It was not a challenge to the calculation of the scheme employer's levy. It therefore fell foul of the fundamental distinction between the first and second stages of the Board's function, and the principle that the second stage alone may form the subject of the Board's reconsideration or the Ombudsman's remit".*

101. Second, the Trustees assert that no argument was addressed to the Court in *Trustees of the Lithgows Ltd Pension Scheme v Board of the Pension Protection Fund* that D&B had acted other than in the ordinary course of business; they rely on the fact that the opinion of the Lord President at [19] expressly makes it clear that this was not disputed.

(iii) The Ombudsman's arguments

102. In paragraph 15 of his skeleton argument Mr Evans advanced the following proposition in relation to Rule E2.2(3), which might have been taken as offering some support for the arguments being put forward by the Trustees:

> *"… there is an objective element to this analysis: even if the process applied by D&B when calculating the failure score was its usual practice, if that practice was, objectively considered, inappropriate or unreasonable, it could be said not to be 'normal' business practice"*

103. However, in oral submissions, he accepted that this argument was founded on an incorrect premise, namely that the test was whether what was done was

within the *"normal business practice"* of D&B Luxembourg. This is not the wording used in Rule E2.2(3). Having reflected on the matter Mr Evans was inclined to accept (rightly in my view) that, on the basis of the true wording of the rule, his submission that Rule E2.2(3) is to be construed as giving rise to objective considerations of appropriateness or reasonableness could only be maintained if the Trustees' arguments about the need to import public law considerations of fairness and rationality were correct, as to which he did not wish to advance any argument. I therefore need say no more about this aspect of Mr Evans' submissions.

(iv) Conclusions on the construction of Rule E2.2(3)

104. I have already given my reasons for rejecting the Trustees' reliance, as part of the process of construction, on the background matters referred to in paragraphs 58 to 59 and 77 above. These matters form the principal basis of the Trustees' argument that the words *"normal"* and *"ordinary course of business"* in Rule E2.2(3) must be construed so as to import an objective element such that the Board must be satisfied (at least where objection is taken) that the Failure Score does not suffer from a defect in its genesis or computation such that its adoption would be procedurally unfair or irrational.

105. I must therefore approach the interpretation of Rule E2.2(3) without reference to that background and on the basis of the ordinary and natural meaning of the language viewed in its proper context. Doing so, I have concluded that the language used is not amenable to the interpretation contended for by the Trustees and that the Board's arguments in relation to the construction of Rule E2.2(3) are to be preferred.

106. It is, with respect to Mr Herberg's eloquent arguments, stretching the meaning of the language of Rule E2.2(3) far too far, in my judgment, to import the objective considerations of fairness and rationality – or, indeed, any form of value judgment as to the way in which D&B should be undertaking its Failure Score assessments - into the meaning of the words *"normal"* and *"ordinary course of business"* which he seeks to import. Applying the ordinary and natural meaning of these words points the court, not to such objective considerations, but to a relatively simple factual assessment of whether or not D&B

Luxembourg was applying its ordinary course of business in generating the Scheme's Failure Score. That is not to say that such factual assessment should not be undertaken objectively by asking whether an objective observer, with knowledge of D&B Luxembourg's business, would view the transaction as having taken place in the ordinary course of business (consistent with what Etherton J said in *Ashborder* at [227]). However, that is not the same thing as interpreting the words in Rule E2.2(3) as importing objective value judgments such as considerations of fairness and rationality and, to that extent I reject Mr Herberg's argument that *Ashborder* provides support for this aspect of his argument.

107. The consequence of the Trustees' construction argument, if correct, would be that, even if the Failure Score were indisputably as a matter of fact the *"normal"* Failure Score which was generated *"in the ordinary course of business"* of D&B Luxembourg (applying the ordinary and plain meaning of those words), if it was not objectively "fair" or "rational" or "appropriate", the Board would be obliged to apply a different Failure Score (not the *"normal"* one generated in the *"ordinary course of business"* of D&B Luxembourg). That is simply not what Rule E2.2(3) says should happen.

108. The correctness of this approach to the meaning of Rule E2.2(3) seems to me to be reinforced by the context in which it appears. That context includes the reference to specific examples in other Rules of instances where the Failure Score to be adopted for the purposes of calculating the Risk-based Levy is not that which would normally be generated in the ordinary course of D&B's business, for example under Rule E3.3 in the case of scheme employers which are the subsidiaries of parent companies which are at severe risk of insolvency. Similarly, when one has regard to Rule E3.5, I agree with Mr Giffin (see paragraph 85 above) that, if the Trustees' construction of Rule E2.2(3) were correct, this would give rise to a striking anomaly between the scope of any appeal to D&B against a Failure Score, on the one hand, and the scope of a review or reconsideration by the Board of a Failure Score, on the other hand.

109. Finally, the context includes the commercial background (the adoption of Failure Scores assigned by a commercial third party) against which the

2010/11 Levy Determination was drawn up and promulgated. I accept Mr Giffin's argument that, were the Trustees' construction of Rule E2.2(3) to be adopted, it would produce a commercially unworkable result, which would be inconsistent with that commercial background: see paragraph 83 above.

110. Against this background, I do not consider that Mr Herberg's additional argument referred to at paragraph 95-98 above adds anything. No evidence was presented to the Ombudsman or this Court to establish that the practice of D&B Luxembourg in relation to the financial statements upon which it relied to assign Failure Scores to Luxembourg companies was not standard practice amongst credit rating agencies carrying out a similar function in Luxembourg, or was not otherwise objectively justified in the circumstances prevailing in Luxembourg, so as to put it in breach of the contractual duty owed to the Board which required it to exercise the skill and care to be expected from *"a skilled and experienced person* ***carrying out the same function****"* (emphasis added)[5]. In these circumstances, this argument does not assist on the factual question of whether or not the Failure Score assigned to the Scheme Employer by D&B Luxembourg was the *"normal"* Failure Score assigned by D&B Luxembourg *"in the ordinary course of its business"*.

111. Equally, I do not consider that the fact that, separately from what appears in the 2010/11 Levy Determination, D&B owed the Board the contractual duty referred to affects the construction of Rule E2.2(3) so as to drive the Court to conclude that it must read into the clear words of Rule E2.2(3) a power on the part of the Board to enquire into the process by which D&B produced the Failure Score.

112. In relation to *Trustees of the Lithgows Ltd Pension Scheme v Board of the Pension Protection Fund*, it is not necessary for me to resolve the dispute between the Board and the Trustees as to whether the passage relied upon by the Board was *obiter*, although there appears to be some force in the Trustees' contention that it was. I would not be bound by it in any event. However, *obiter*

[5] The case as presented by the Trustees to the Ombudsman was a different one that relied upon a submission that the practice of D&B Luxembourg was different from that of D&B UK and, as such, could not be regarded as *"good industry practice"*.

or not, I consider that the (shortly stated) reasoning of the Court of Session in that passage is correct for the reasons I have already independently given.

113. Furthermore, while it is obviously correct that the facts in *Trustees of the Lithgows Ltd Pension Scheme v Board of the Pension Protection Fund* are different from the facts of this case and so, in that sense, that case can be distinguished, it seems to me that the point being made by the Lord President in [19] (set out in paragraph 88 above) is a point of principle on the construction of Rule E2.2(3) which is of general application to other cases. The point being made by the Lord President appears to me to have been that, if the Failure Score is, as a matter of fact, the *"normal"* Failure Score assigned *"in the ordinary course of D&B's business"*, there is no provision for departing on a discretionary or other basis from that normal Failure Score. That is precisely the point at issue here: factually it is not disputed that the Scheme's 2010/11 Failure Score was purportedly the normal Failure Score assigned by D&B Luxembourg in the ordinary course of its business. Put another way, it is not suggested that, in assigning that Failure Score, D&B Luxembourg did anything differently from that which it would normally do in the ordinary course of business. What is asserted by the Trustees, however, is that because, on this occasion, this "normal" approach to the calculation of the Failure Score resulted in an "unfair" result (because, in accordance with D&B Luxembourg's normal practice, where these were not supplied to them by the scheme trustees the most up to date financial statements were not used) the Board has a discretion under Rule E2.2(3) to intervene in such a case as a matter of construction of that Rule. So, the question here is the same or similar to the one the Lord President was considering in [19] of the judgment in *Trustees of the Lithgows Ltd Pension Scheme v Board of the Pension Protection Fund*.

114. That said, I do not find the passage in Lord President's judgment, of itself, strongly persuasive on the issue before me. This is because, although he opined on the very issue which I have to consider, the Court of Session did not have the benefit of having the arguments addressed to it that have been advanced in this Court on that issue. In particular, it appears that the appellants in *Trustees of the Lithgows Ltd Pension Scheme v Board of the Pension Protection Fund* did not advance the argument that what is to be regarded as being *"normal"* and *"in the*

ordinary course of business" must be construed so as to import into the meaning of Rule E2.2(3) an objective requirement that the Failure Scores be arrived at in a procedurally fair and rational way.

115. For these reasons, I conclude that the Ombudsman made an error of law (a) in failing to address her mind to the construction of Rule E2.2(3) and (b) to the extent that she concluded (without analysing its construction) that Rule E2.2(3) gave the Board (and hence her) any discretion to apply a different Failure Score to the one assigned to the Scheme Employer by D&B. Had she correctly addressed her mind to the construction of Rule E2.2(3) she would have had to conclude that Rule E2.2(3) gave the Board no such discretion.

Construction and application of Rule B2

(i) The Board's arguments

116. The Board's over-arching argument in relation to the construction of Rule B2.1(1) (set out in full and in context in paragraph 24(a) above) is that this provision is engaged where the information that the 2010/11 Levy Determination requires to be used is not the information that has in fact been used. It is only in such a case that *"information supplied for or used in the [Calculation]"* is *"incorrect in a material respect"* within the meaning of Rule B2.1(1) so as to bring Rule B2.2(1) into play, with the result that the Board would then have a discretion to undertake the Calculation *"on the basis of information which appeared to it to be correct for the purposes of these Rules"*. ".

117. Examples given by the Board where, it says, Rule B2.1(1) would typically apply include D&B originally supplying the Board with the Failure Score for the wrong company, or if the employer's Failure Score in fact assigned in the ordinary course of business was 90, but due to clerical error the Board was told that it was 60.

118. Central to the Board's argument was the submission that *"information supplied for or used in the [Calculation]"* should be construed narrowly to mean, in the context of this case, only the Failure Score supplied to the Board by D&B and not, for example, any of the underlying data. Mr Giffin gave an example to illustrate this distinction. Suppose a UK-based scheme employer had made an

error in its filed accounts which (in accordance with its normal practice) were then used by D&B with the result that a different Failure Score was assigned to the employer than would have been the case if there had been no such error in the accounts. He submitted that such an error in the underlying information would not engage Rule B2.1, because the information that counts for the purposes of Rule B2.1 in the context of cases like this – the Failure Score assigned by D&B – was not incorrect, having been assigned in the ordinary course of business based upon the accounts filed by the employer at Companies House. The same would apply in the case of another example given by Mr Giffin, where a County Court judgment that should have been removed from the Court record of a scheme employer had wrongly not been removed and was thus taken into account in D&B's assessment of the employer's Failure Score.

119. Applying this approach back to the facts of this case, the Board sought to attack the Ombudsman's approach to the construction and application of Rule B2.1(1). In paragraph 47 of the Determination, she stated that:

> *"D&B Luxembourg's failure score was incorrect in a material respect – it was based on out of date financial statements that were irrelevant to the 2010/11 levy year – and so was not 'correct and legitimate in itself'"*

120. The point made by the Board about this approach was that the Ombudsman was wrong to characterise the Failure Score assigned to the Scheme Employer as *"incorrect in a material respect"* on the basis that she did, because the Failure Score which D&B Luxembourg assigned to the Scheme Employer <u>was</u> the Failure Score that it assigned in the ordinary course of its business, which is what the Levy Determination required to be used, and was thus *"correct"*. In other words, what is *"incorrect"* in this context is to be interpreted in the light of what is required to be done under Rule E2.2(3).

121. The Board sought to build on this by contending that, if the Ombudsman were right, any Failure Score which was not a sufficiently accurate and up to date assessment of the risk of insolvency of the scheme employer (even though it was the normal D&B Failure Score issued in the ordinary course of its business) would be *"incorrect information"* for the purposes of Rule B2, which would require the Board to reconsider every employer's insolvency risk for itself, including the accuracy of all the underlying information taken into account by

D&B in arriving at the Failure Score. This, it argues, would defeat the purpose of using Failure Scores supplied by an external provider, which cannot have been the intention of those who drafted Rule B2.

122. Mr Giffin further submitted that any other interpretation of what is *"incorrect information"* for the purposes of Rule B2.1(1) would make a nonsense of the limited grounds for invoking the D&B appeal procedure contained in Rules E3.3 and E3.5. In effect he was adapting and applying to the Rule B2 construction issue the argument that he had previously deployed in relation to the Rule E2.2(3) construction issue: see paragraph 85 above. His point here was that, by reason of Rule E3.5, information is only *"incorrect"* so as to permit D&B to act and to assign a corrected Failure Score if it was *"incorrect or incomplete by comparison with the information which should normally have been taken into account by DBUK in assigning a Failure Score or other measure at that date"*. I believe that, for the purposes of this argument, Mr Giffin was approaching this provision on the basis that, in the case of a Failure Score assigned to a foreign scheme employer by D&B UK's *"relevant associated undertaking"* (as in this case), Rule E3.5 should be read as referring to information normally taken into account by that undertaking. In my judgment that must be right. On that basis, Mr Giffin argues that, were the Trustees' construction of Rule B2.1(1) correct, the scope of the challenge available to a Failure Score on appeal to D&B under Rule E3 would, again, be markedly narrower than the scope of the challenge available on a review or reconsideration by the Board, which would be an implausibly striking anomaly.

123. Finally, Mr Giffin relied on a number of previous decisions of the Ombudsman on the meaning of Rule B2.1(1). I have not found these decisions to be of any significant assistance to me in dealing with the relatively sophisticated arguments addressed to me on this issue, largely because it is not clear that such arguments were addressed to the Ombudsman and also because I have been able to reach a clear conclusion without recourse to the reasoning in those decisions. In addition, Mr Herberg does not rely on these decisions to provide positive support for the Trustees' case. Hence, I do not propose to say any more about them.

(ii) The Trustees' arguments

124. The Trustees argue that the Board's approach to the construction of Rule B2 is *"extraordinarily restrictive and formalistic"* and cannot be correct because, if it were, any error of D&B in arriving at the Failure Score (as opposed to an error in, for example, reporting the Failure Score to the Board) would not render the Failure Score *"incorrect"* for the purposes of Rule B2, as it would still be the Failure Score reported by D&B in the ordinary course of its business. Hence, they contend, even where, for example, D&B consciously declined to take financial statements into account (or placed less weight on them) because of the Trustees' representatives' red hair, the information supplied would not be *"incorrect in a material respect"* because it constituted information supplied by D&B in the ordinary course of business. The Trustees say that, if this were the correct construction, this would be the clearest example of an abdication by the Board of its duty to calculate the Levy in accordance with the statutory requirements.

125. However, the Trustees argue that this is not the correct construction of Rule B2.1(1) and so the difficulty identified above does not arise. They say that the Board's interpretation is contrary to the plain and natural meaning of the provision. Information (for example, the D&B failure score) can be *"incorrect in a material respect"* either because it is not what it purports to be (for example, where D&B have muddled the scores between companies) or because it is flawed in its derivation: for example, it is based on an arithmetical error, or because underlying information which should have been taken into account in its computation has not been taken into account.

126. The Trustees further argue on the basis of the wording of Rule B2.2(3), and in particular the reference therein to information not being incorrect *"where it is correct and legitimate in itself"*, that Rule B2.2(1) is engaged (giving the Board the discretion to review and revise the amount of the Levy calculated on the basis of the incorrect information) not only where the Failure Score is based upon out of date financial statements (i.e. not the *"correct"* financial statements as the Trustees would put it) but also where the Failure Score was not *"legitimate"*. This, they say, occurs when, for example, D&B (and the Board)

can be said to be responsible for the erroneous use of out of date financial statements through not informing scheme trustees in advance of the policy of D&B Luxembourg not to obtain the most up to date filed accounts of the scheme employer when assessing the Failure Score.

(iii) The Ombudsman's arguments

127. The Ombudsman advanced no arguments in relation to the construction of Rule B2.

(iv) Conclusions on the construction of Rule B2

128. In my judgment the arguments of the Board on this issue are to be preferred. In essence what is *"incorrect"* for the purposes of Rule B2.1(1) is to be interpreted in the light of what is required to be done under Rule E2.2(3).

129. I have reached this conclusion because it seems to me that (contrary to the effect of the argument advanced by Mr Herberg), there must be some limit placed on the range of information that can qualify as *"incorrect"*. Were this not so, it would mean that any inaccuracy in the contents of the underlying pieces of information supplied to or obtained by D&B in assigning a Failure Score would render the Failure Score open to challenge even if D&B had thereby utilised all the pieces of information that it would normally use in the ordinary course of its business. I consider that, correctly construed, the distinction contemplated by Rule B2.1(1) is between, on the one hand, a Failure Score or some component part of the Failure Score which is *"incorrect"* in the sense that it is not based upon the information that would normally be used by D&B in the ordinary course of its business (which would engage the Rule B2.2(1) discretion to revise the amount of the Levy) and, on the other hand, a Failure Score which is based upon such information but where that information contains an inaccuracy, such as that identified by Mr Giffin (accounts drawn up incorrectly by the scheme employer before being filed or a County Court judgment wrongly remaining on the record of a scheme employer), a situation which would not engage the Rule B2 discretion.

130. This is also the answer to the Trustees' reliance on Rule B2.2(3). I do not accept the argument upon which Mr Herberg relies concerning the meaning and effect of the words *"correct and legitimate in itself"* in that Rule. In my judgment, the

Scheme's 2010/11 Failure Score and the information upon which it was based was *"correct and legitimate"* because it was arrived at in a manner and on the basis of the information which D&B Luxembourg would normally use in the ordinary course of its business. The fact that more up to date accounts than were used to assess the Failure Score existed and could have been provided to D&B Luxembourg so as to produce a different Failure Score does not render incorrect or illegitimate the information supplied to or used by D&B Luxembourg.

131. I consider that this approach to construction sits most comfortably with the natural and ordinary meaning of the word *"correct"* in Rule B2.1(1) and *"correct"* and *"legitimate"* in Rule B2.2(3). It seems to me (as I think Mr Herberg was inclined to accept) that the Trustees' first real complaint about the information used to arrive at the Scheme Employer's Failure Score in this case was not that it was "incorrect" in the ordinary sense of that word (that is to say "wrong" or "not in accordance with fact"), but rather that there was in existence further information that could have been used if D&B had been provided with it. That does not make the information actually used "incorrect", nor is it the same thing as D&B using "incorrect" information to generate the Failure Score in the sense of information that it normally uses in the ordinary course of its business, such as a set of accounts that did not relate to the scheme employer but some other company.

132. The Trustees' second complaint (which they say distinguishes this case from many before it, such as *Trustees of the Lithgows Ltd Pension Scheme v Board of the Pension Protection Fund* is that (as they allege) D&B and the Board were "responsible" for the fact that the Trustees did not ensure that D&B Luxembourg were supplied with up to date accounts because they did not make it clear to the Trustees in advance of the 2010/11 Levy Calculation being undertaken that such accounts were not automatically obtained by D&B Luxembourg as a normal part of its ordinary course of business: see, for example paragraph 30 of Mr Herberg's skeleton argument. Leaving aside the factual merits of this allegation, it seems to me that this does not assist the Trustees as a matter of construction of Rule B2.1(1). Information is either factually correct or it is not. If it is correct in itself but not as up to date as other available information, the question of who (if anyone) is responsible or culpable

for the fact that the more up to date information was not used might be relevant to the exercise of any discretion to take that more up to date information into account, but cannot affect the question of the correctness of the information actually used in the calculation of the Levy for the purposes of Rule B2.1(1).

133. I also accept the Board's argument that, were the Trustees' construction of Rule B2.1(1) correct, it would give rise to an implausibly striking anomaly between the scope of the challenge available to a Failure Score on appeal to D&B under Rule E3, on the one hand, and the scope of the challenge available on a review or reconsideration by the Board based on Rule B2.1(1), on the other hand, when the key word used in each of Rules B2.1(1) and E3.5 is the same, namely *"incorrect"*.

134. For these reasons I conclude that, again, the Ombudsman made an error of law in her approach to this issue.

The Remission Issue

135. In view of my decision on the Construction Issue, it is not strictly necessary for me to resolve the Remission Issue (to the extent that it truly remains an issue following argument), it being agreed that the appropriate order for me to make in these circumstances is that the Ombudsman's decision be replaced with an order upholding the decision of the Reconsideration Committee.

136. I also bear in mind that, in a great many references to the Ombudsman, the Remission Issue will not arise. It will perhaps be a relatively rare case in which the Reconsideration Committee has reached its decision on the basis that it has no discretion to alter the decision of the Board under review and where the principal question for the Ombudsman will be whether or not the Board did have such a discretion. In most review cases one might expect the parameters of the reference to the Ombudsman to be rather different and not to raise at all the question that arises in this case.

137. Nonetheless, because this is the first time that the issue of the scope of the Ombudsman's powers on a reference under section 213 of the Act and Regulation 2 of the PPF Ombudsman Regulations has come before a court, and

the matter has received significant attention in the skeleton arguments and oral argument, I will set out such conclusions as I think are appropriate in the circumstances.

(i) A preliminary point – what did the Ombudsman decide?

138. The arguments in front of me focused principally on whether or not the Ombudsman had the power (alternatively whether it was an appropriate exercise of any power she might have) to direct the Reconsideration Committee to calculate the Failure Score for the Scheme Employer on the basis of the most up to date financial statements issued by the company up to the management date used by D&B Luxembourg, namely 5pm on 31 March 2009. This appears to be the effect of what she directed in paragraph 52 of the Determination.

139. To the extent that it is appropriate for me to do so I shall seek to reach a conclusion on that issue below. However, before doing so, it is necessary to make a preliminary observation about what, in fact, the Ombudsman was deciding the Reconsideration Committee was required to do. In my view there is a significant lack of clarity about this aspect of her decision.

140. It appears from paragraphs 47 and 48 of the Determination that the Ombudsman based her overall decision on the reference on Rule B2 (not Rule E2.2(3)), concluding that this *"allowed"* the Board to correct the Failure Score assigned to the Scheme Employer because this was *"incorrect in a material respect"* in that it was based on out of date financial statements. Hence, she appears to have been accepting (as must be correct) that Rule B2 gave the Board a discretion to correct the Failure Score and that, although it was necessary for that discretion to be exercised so as to decide what the Failure Score should now be, this was not an exercise that she should undertake herself, rather it should be the Board that should do so. This seems to follow from the following passages in the Determination:

(a) First, paragraph 48: *"...I have concluded that [recalculating the Levy] is the only safe course of action. It is not for me to say what the failure score should be, or what range it should fall in."*

(b) Second, paragraph 50: *"Although I accept that some of these factors may in part have been considered by the PPF, there is not sufficient evidence for*

> *me to conclude with any degree of certainty that all relevant and no irrelevant matters were taken into account. [The] reasons given here do not evidence this.* ***As the PPF says its usual practice is to consider this range of factors, I consider this to be a further reason why the matter should be remitted back to the PPF Board for reconsideration****"* (emphasis added).

Given the list of factors set out by the Ombudsman in paragraph 50, which she seemed to be accepting the Board would wish to take into account in exercising its Rule B2.2(1) discretion, she also appears to have been accepting that it would have been open to the Board not to have decided, as a matter of discretion, to correct the basis upon which the Failure Score was calculated in this case. This seems to be so notwithstanding that paragraph 48 of her Determination suggests that she thought that the ease with which the Risk-based Levy could be recalculated, on the basis of the revised Failure Score that D&B Luxembourg had already supplied, meant that the answer as to how to exercise that discretion ought to be fairly clear.

141. Yet, if this was her thinking, it was not reflected in the paragraph 52 direction which, in effect, both directed the Board to correct the original Failure Score (thereby purporting to exercise the Board's Rule B2.2(1) discretion for it) and also determined what the revised Failure Score should be, given that this would automatically follow if it were to be calculated on the basis of the financial statements specified in the direction.

142. Therefore, even if I had found that the Ombudsman was right in concluding that the Rule B2.2(1) discretion was engaged on the facts of this case such that it was open to the Board to correct the basis upon which the Failure Score had been calculated, and even if I were to conclude that it was open to the Ombudsman to exercise that discretion herself without remitting the matter to the Reconsideration Committee, it would have been necessary to consider carefully whether, in fact, she did exercise that discretion at all and, if so, whether she exercised it properly.

143. Against that background I turn to consider the arguments on the issue of whether it would have been open to the Ombudsman to exercise the Rule

B2.2(1) discretion herself (or indeed any discretion available under Rule E2.2(3)) without remitting the matter to the Reconsideration Committee.

(ii) The Ombudsman's arguments

144. Departing from the approach taken above in relation to earlier issues, I start with the Ombudsman's arguments because, as it turns out, much of what Mr Evans submitted was not controversial, there being a much greater measure of agreement between him and Mr Giffin on this issue than there had appeared to be at the outset of the hearing.

145. The first question is when the Ombudsman can intervene. As to this, the general position is clear (and as I understood it, common ground between the parties to this appeal). As Mr Evans correctly put it in his skeleton, *"the only ground on which the Ombudsman can intervene is if she decides that the Board's decision was incorrect (i.e. 'was not reached correctly', within Reg 16(2)). She cannot intervene just because she disagrees with the substance of the Board's decision; she cannot substitute her decision for that of the Board merely because she would have reached a different decision if she had been the decision-maker."*

146. The next and more difficult question is how the Ombudsman can intervene if the Board's decision was not reached correctly. As to this, Mr Evans submits as follows: *"If she concludes that the decision was incorrect, she has power to direct the Board how to re-take the decision; her jurisdiction is not confined to setting aside the incorrect decision and remitting it. In this sense, she has a full appellate function and not merely a review function: she can direct the terms of the fresh decision the Board must make, in effect replacing their decision with hers."*

147. I do not propose to set out in all its detail Mr Evans' argument in support of his submission that the Ombudsman can direct the terms of the fresh decision that the Board must make, because, first, this submission is plainly right for reasons that can be quite shortly summarised and, secondly, it did not seem to me, in the end, that Mr Giffin disputed this particular point. The main reasons for this conclusion can be summarised as follows:

(a) Regulation 16(2)(a)(ii)(bb) of the PPF Ombudsman Regulations gives the Ombudsman the power when remitting the matter to the Board with

directions (which she must do if she considers that the Board's decision was not reached correctly) to direct that the original decision be revoked and replaced.

(b) This is reinforced by Regulation 16(3)(b)(ii) which makes it clear not only that the Ombudsman may revoke the original decision of the Board and *"replace it with a different determination"*, but also that, if this is her decision, she must explain *"to what extent"* the Board is directed to do this, which clearly suggests that she may specify the different determination which is to replace the one being revoked.

(c) By Regulation 16(6), the Board is expressly given power to do whatever the Ombudsman directs it to do. As Mr Evans correctly put it in his skeleton argument, *"This is a clear indicator that the Ombudsman can determine and direct the substance of the replacement decision of the Board: it is only if the Ombudsman can direct the Board what to do that the possibility arises that the Board might need to be empowered by these Regulations to take that action; if it were for the Board itself to determine what action to take, it would necessarily have to act within its statutory powers and this extension of its powers would not be necessary."*

148. However, the real issue is not whether the Ombudsman can ever direct the Board how to exercise its discretion but when it might be appropriate for her to do so and, in particular, whether it would have been appropriate for her to do so in this case if she were correct as a matter of law that there was a discretion to exercise. Mr Evans' argument did not really address this issue.

(iii) The Board's arguments

149. In the end, as I understood his submissions, Mr Giffin was not disputing that Regulation 16 gives the Ombudsman the power to direct the Board how to exercise a discretion vested in it. However, he argued that, at least in the circumstances of this case, the Ombudsman should not have done so, for the following reasons:

(a) First, just because the Ombudsman has such a general power (given to her to enable her to act flexibly and justly across the panoply of matters that are

capable of being referred to her) does not mean that it would be appropriate for such power to be exercised in every case coming before her.

(b) Second, in particular it was not appropriate (and would amount to an improper exercise of the general power) for her to do so where the Board had not exercised its discretion at all (and so where there was no question of an exercise of discretion by the Board being *"not correct"* so as to be open to challenge on a reference under Regulation 2 of the PPF Ombudsman Regulations 2005 and thus open to be re-exercised on a correct basis by the Ombudsman). Rather, the Board's "error" was to conclude that it did not have a discretion to change the Failure Score and, this error having been pointed out and corrected by the Ombudsman, the Board should be directed by the Ombudsman to undertake the first exercise of the (now established) discretion. Put another way, if the Ombudsman cannot exercise the discretion of the Board afresh in a case where the Board actually exercised it so as to substitute her view as to how it should be exercised for that of the Board (save in the exceptional case where that exercise was *"not correct"*), she should not as a matter of principle be able to exercise it instead of the Board in a case where the Board did not exercise it all because it did not appreciate that it had such a discretion.

(c) Mr Giffin argued that this approach was consistent with section 213(1)(b)(ii) of the Act, pursuant to which Regulation 16 of the PPF Ombudsman Regulations was promulgated. This provides that *"(1) Regulations must make provision …(b) for the PPF Ombudsman … (ii) to remit the matter to the Board with directions* ***for the purpose of giving effect to his determination****"* (emphasis added). His point was that, in this case the Ombudsman's *"determination"* was, or should have been, that the Board did have a discretion to intervene to change the Failure Score in the circumstances arising (on the footing that the Ombudsman was correct in her decision on this prior issue). The correct direction to give effect to such *"determination"* would have been to direct the Board that they did have such a discretion and to reconsider the case with a view to exercising it. No more than that was required of the Ombudsman.

(d) Third, even if, in some circumstances, it could be appropriate for the Ombudsman to exercise the (now established) discretion for the first time without remitting that exercise to the Board (with the result that the Board would be directed to *"replace"* its determination with a determination specified by the Ombudsman), this was not such a case, in that the Ombudsman did not have all the relevant material before her to enable her to do so and/or she was not in as good a position as the Board to undertake that exercise.

(iv) The Trustees' arguments

150. The Trustees supported the position taken by the Ombudsman on this issue but advanced no additional arguments.

(v) Conclusions on the Remission Issue

151. In my view, the answer to this issue is that the Ombudsman has broad general powers on a referral of a reviewable matter, which in some circumstances may justify her in directing not only that the decision of the Reconsideration Committee be revoked but also that it be replaced by a decision specified by her. However, whether it would be appropriate (in the sense of being a proper exercise of the power by the Ombudsman) to make such a direction will depend on the nature of the decision made by the Reconsideration Committee and the facts of the case.

152. Regulation 16 is drafted in very wide terms and, in my judgment, clearly contemplates, for the reasons given by Mr Evans, that the Ombudsman might direct not only that the decision of the Reconsideration Committee be revoked but also that it be replaced by a decision specified by the Ombudsman.

153. However, that does not mean that the Ombudsman should take this step in every case where she concludes that the Reconsideration Committee has wrongly concluded that it did not have a discretion to intervene. It is to be borne in mind that Regulation 16 was brought into force and drafted as it was to cover references to the Ombudsman across a very wide range of reviewable matters, many of which would bear little resemblance to the instant case.

154. I accept that there may be circumstances in which it might be appropriate for the Ombudsman (having found that the Board had incorrectly concluded that it did not have a discretion to intervene) to exercise that discretion herself without remitting the matter to the Board, for example where there is plainly only one way in which the discretion could be exercised once it is acknowledged that it exists. To that extent, if Mr Giffin's submission was that the Ombudsman can never exercise a discretion vested in the Board which the Board had wrongly held it did not possess, I reject his submission. The wording in Regulation 16 is too broad to permit of such a restrictive construction, even in the narrow category of reviews he was contemplating in his submission.

155. However, I would have thought that this ought to be a rare case given that, in any such case, the Ombudsman would not have had the benefit of the Board's prior consideration of the issue. In most cases one would expect the Ombudsman to be in a much better position to exercise the discretion correctly herself (if it has not been *"correctly"* exercised by the Board) if she has had the benefit of that prior (even if ultimately incorrect) consideration to draw on.

156. This is, in my judgment, such a case and I think that this is the step that the Ombudsman ought to have taken here (if, contrary to my main finding, she was correct to conclude that Board had been incorrect to decide that it did not have a discretion to intervene). All the more so, where she appears to have concluded herself that she was not in the best position to decide the matter, whereas the Reconsideration Committee was in such a position (see paragraphs 48 and 50 of the Determination and paragraph 140 above).

The Merits Issue

157. This issue only arises if, contrary to my findings above, (a) the Ombudsman was correct in law to hold that, in the circumstances of this case, the Board had a discretion under Rule B2.2(1) whether or not to substitute a different Failure Score for the Scheme Employer for 2010/11 from that assigned by D&B based upon the most up to date accounts and (b) it was properly open to her to exercise that discretion herself.

158. Having regard to my findings on those prior issues, and the fact that it is not at all clear whether the Ombudsman in fact intended to exercise or felt capable of exercising such discretion herself (see paragraph 140 above), I do not propose to extend further an already lengthy judgment by entering into a detailed consideration of the arguments addressed to me on the Merits Issue, which were contained in paragraphs 58 to 62 of Mr Giffin's skeleton argument and paragraphs 40 to 45 of Mr Herberg's skeleton argument, and were supplemented in oral argument (Mr Evans on behalf of the Ombudsman made no submissions on this issue).

159. I think it appropriate to say only that, for the reasons given shortly below, I was not persuaded by Mr Herberg's submissions that it would not have been open to me to find that the Ombudsman's exercise of the discretion (if that is indeed what she was purporting to do) was not open to challenge on appeal to this court.

160. On the hypothetical footing identified in paragraph 157 above, one can postulate that the exercise of the relevant discretion would have required the Ombudsman to come to a balanced conclusion as to whether the practice for assessing Failure Scores undertaken in the ordinary course of business by D&B Luxembourg, taken together with the fact that the Board and D&B put the onus on the Trustees to find out exactly what that practice involved, was sufficiently "unreasonable" or "unfair" to the Trustees as to justify substituting a new Failure Score assessed on the basis of the most up to date accounts for the Scheme Employer.

161. If that is right, it is hard to see how the Ombudsman's consideration of the merits of that practice in paragraphs 38 to 44 of the Determination could be said to have properly taken into account all the material facts that should have been taken into account by her. Examples include the material referred to in paragraph 60 and 61 of Mr Giffin's skeleton. In the case of the material referred to in paragraph 61 this was before the Ombudsman not in the form of Mr Collins' witness statement but in the letter from D&B to the Trustees' solicitors dated 12 August 2011 at page 236 of the Appeal Bundle, as well as the letters

from D&B to the Trustees' solicitors dated 8 December 2010 and 31 March 2011 (in particular pages 219 and 225 of the Appeal Bundle).

162. Paragraph 40 of the Determination seems to me to be particularly problematic. It is premised on the basis that, if D&B Luxembourg did not take into account the most up to date accounts, it was not *"doing its job properly"* and that this was as a result of *"D&B's shortcomings, or the limitations placed on D&B by the PPF's instructions to it"*. This conclusion was arrived at without the Ombudsman apparently considering or taking into account the evidence before her to the effect that what D&B Luxembourg did in this case was in accordance with its ordinary course of business, that this practice was commercially justifiable and reasonable in the circumstances prevailing in Luxembourg, that it was not a practice arising out of limitations placed on D&B by the Board and that, in the light of warnings given to scheme trustees over a number of years, it was reasonable to expect the Trustees to have contacted D&B to establish what the practice for assessing the Failure Score of the Scheme Employer was.

The Interest Issues

163. The Ombudsman dealt with interest shortly in paragraph 53 of the Determination (set out in paragraph 45 above). She did not address the question of whether she had the power, on this referral, to make the direction that she made. Such a direction had not been requested in the Trustees' reference application dated 19 October 2011, nor was this jurisdiction question addressed in the submissions made on behalf of the parties in the correspondence before her prior to her reaching her preliminary conclusions in August 2012, nor did the Ombudsman make any reference to interest or make an equivalent direction in her preliminary conclusions to that eventually contained in paragraph 53 of her final Determination.

164. I have to consider the question of jurisdiction. There is no real dispute that, if the Ombudsman did have the power to make such a direction on this review, she correctly exercised it. This is because, as conceded in Mr Giffin's skeleton argument on behalf of the Board, *"It is fair to say that in practice that is likely*

to be precisely the approach that the Board would take where a referral to the Ombudsman in respect of a levy review succeeds".

165. It was common ground on the hearing of this appeal that under section 181A of the Act and Regulation 19A of the Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006, interest must be charged on late payment of a Levy, unless the Board is satisfied of one of the matters set out in Regulation 19A(7) or (8) – essentially, for present purposes, that it is *"reasonable"* not to charge all or part of the interest that would otherwise be chargeable.

166. By the time the Trustees referred the Reconsideration Committee's decision on its review of the Scheme's 2010/11 Risk-based Levy to the Ombudsman (27 October 2011), the Board had already made a decision that interest should be charged on the outstanding portion of the Scheme's 2010/11 Levy (that is to say the portion that was referable to the disputed Failure Score) notwithstanding the fact that the Trustees had informed the Board that they would be making the reference to the Ombudsman. The Board's decision to this effect was communicated to the Trustees no later than 18 October 2011 in an email responding to a request made on the same day by the Trustees' solicitors that interest should not be charged until the outcome of the referral process was known. The Board's response to that request included the following: *"Schemes are encouraged to pay levy invoices that are subject to appeal as payment of the levies is a statutory obligation of the trustees… Once a successful appeal is concluded any overpayments will be refunded as soon as possible"*.

167. A decision by the Board not to waive all or part of the interest chargeable on an outstanding Levy is, of itself, a reviewable matter under paragraph 19B of Schedule 9 of the Act, quite separately from any decision as to the amount of the Levy, which, as noted above, is reviewable under paragraph 19 of Schedule 9 of the Act. Hence, in my judgment, a review (as in this case) of the Board's decision as to the amount of the Levy cannot be taken to encompass a review of any decision that the Board may also have taken not to waive interest on an outstanding Levy. Further, the Ombudsman's wide powers under Regulation 16 are only exercisable *"in relation to a reviewable matter referred to him"* (see

Regulation 16(1) and (2)). Hence, even though, on a reference of a decision by the Board not to waive interest under Regulation 19A(7) or (8), the Ombudsman would have the power to revoke the Board's decision on interest and replace it with a determination that interest should be waived, this power cannot arise where the matter is before the Ombudsman on a reference of a different reviewable matter and not on a reference of the Board's decision as to interest.

168. It is clear that the Trustees did not refer the Board's decision not to waive interest on the Scheme's outstanding 2010/11 Levy to the Ombudsman, despite it being clear that this was the Board's decision. In making that observation I do not imply any criticism of the Trustees or their solicitors. On the contrary, as the email from the Board referred to above made clear, the Trustees could have had little doubt that any interest charged and paid would be waived by the Board and repaid to the Trustees were any reference as to the amount of the Levy to be successful without any dispute or the need for any subsequent referral process on that issue. So the non-referral of the Board's decision on interest was entirely understandable.

169. Subsequently, the matter of interest was referred to by the Trustees' solicitors in their letter dated 17 October 2012 commenting on the Ombudsman's preliminary conclusions. However, even here, they did not actually ask the Ombudsman to make any direction in relation to interest (they merely complained about the provisional approach to interest that had been taken by the Board pending the outcome of the reference). Even if they had, this letter was never copied or sent to the Board. In my judgment, it cannot be construed as formally referring the Board's decision on interest to the Ombudsman under paragraph 19B of Schedule 9 of the Act.

170. In my judgment, because the separate reviewable matter of the Board's decision as to interest was not referred to the Ombudsman, she had no jurisdiction to make the direction she made in paragraph 53 of the Determination.

The Costs Issues

(i) Introduction

171. The Ombudsman's final decision on costs was contained in paragraph 51 of the Determination:

> *"There is no free service, such as the Pensions Advisory Service or Citizen's Advice, available to assist the trustees pursuing redress with the PPF. Therefore it is understandable that trustees may wish to obtain professional advice, and depending on the circumstances of the case it may be appropriate for me to make directions in respect of the cost of this. I am persuaded that such a direction needs to be made for this referral. The matters to be put to D&B and the Reconsideration Committee were not straightforward, and legal analyses and research was required. Moreover, professional representation was not unreasonable for the PPF and D&B's appeal processes. D&B's process was somewhat tortuous, consisting of five stages, as I have noted PPF reasoning has not been full, and the amounts at stake justified using lawyers as representatives in the PPF appeal. Accordingly whilst I do not think the full legal costs claimed can be awarded, especially because part of the Trustees' arguments have failed or been made in the D&B process which is outside my jurisdiction, I consider the PPF should contribute £10,000 towards the legal costs incurred."*

172. The Costs Issue requires me to consider whether

(a) the Ombudsman had any jurisdiction to make an order for costs;

(b) if she did, whether the process by which she arrived at the above decision was flawed on the ground that the Board was not given any or any proper opportunity to make any representations on the issue; and

(c) if not, whether the decision was otherwise open to challenge on the ground that this was not an appropriate case in which to make an order for costs.

173. It is necessary to summarise briefly the way in which the issue of costs was put before the Ombudsman, as follows.

(a) In their referral application dated 27 October 2011, the Trustees sought two material directions:

> *"4. Award all costs incurred by the Scheme in the appeal process to date, including the costs of the PPF review, the D&B appeal and the application to the PPF Ombudsman"*;
>
> *8. If unable to direct the PPF as requested above, to compensate the Scheme for the increased levy and the costs it has incurred as a result thereof".*

At this stage the costs claimed were not quantified.

(b) The Board's response to the Trustees' referral application dated 30 November 2011 made no reference to the directions sought by the Trustees in respect of costs.

(c) The question of costs was raised, as between the Ombudsman's office and the Trustees, by the Ombudsman's Senior Investigator assigned to the reference, Mr O'Brien, in a letter to the Trustees' solicitors dated 30 April 2012. He stated:

> *"I have to mention the subject of professional fees, as you have requested that the Ombudsman make an award of costs. This office provides a free service, free from the risk of costs inherent in court proceedings. Our procedures are designed to be used without professional assistance. Therefore it is most unlikely that the Ombudsman will make an award for costs, even if he considered that he had the power to do so".*

(d) Before any reply to that letter could be sent, Mr O'Brien followed up with a further letter to the Trustees' solicitors dated 2 May 2012, in which he stated that *"Following a conversation with the Ombudsman about this referral, I am writing to correct the paragraph in my previous letter about awards for costs"*. He then went on to refer to Regulations 16(2)(b)(iii)(aa) and (bb) of the PPF Ombudsman Regulations (the material parts of which are set out in paragraph 174 below) before concluding:

> *"So the Ombudsman has the power to make awards for costs, although I am not aware of a referral when this has been done. However, the Ombudsman will carefully consider your request for a costs award at the appropriate time (and we do recognise that referrals can involve complex points of law, and there is no free assistance available, as is provided by the Pensions Advisory Service in Pensions Ombudsman complaints)".*

(e) As I understand it, neither of the above letters were copied to the Board.

(f) In the Ombudsman's preliminary conclusions on the reference (sent out under cover of a letter dated 31 August 2012), which made no reference to the correspondence referred to in sub-paragraphs (c) and (d) above, she

made the following finding in relation to costs (to be contrasted with her final conclusions, set out in paragraph 171 above):

> *"There is no free service, such as the Pensions Advisory Service or Citizen's Advice, available to assist the trustees pursuing redress with the PPF. Therefore it is understandable that trustees may wish to obtain professional advice, and depending on the circumstances of the case it may be appropriate for me to make directions in respect of the cost of this. However, I am not persuaded that such a direction needs to be made for this referral. The matters to be put to D&B and the Reconsideration Committee were straightforward, and did not require extensive legal analysis. And a referral to my office can be made using a simple form. It does not automatically follow that because a referral to me has been upheld in whole or in part, the trustees can recover the costs of professional advice and representation. I have also taken into account that the trustees, represented by their solicitors, initially made a complaint of maladministration by the PPF, which they subsequently withdrew and replaced with this referral. It would not be appropriate for the PPF to have to bear the costs of an application made in error"*.

(g) In response to receiving the Ombudsman's preliminary conclusions, the Trustees' solicitors wrote to her on 17 October 2012 making detailed submissions on costs in an attempt to persuade her to change her preliminary conclusion and make an order in their clients' favour. For the first time (as I understand it), the amount of the Trustees' costs were quantified at in excess of £89,000. As well as making reference to the purported power of the Ombudsman to order costs (reflecting what had been said by Mr O'Brien on behalf of the Ombudsman in his letter of 2 May 2012), the Trustees' solicitors made a number of substantive points that had not appeared in the Trustees' original referral application in support of the claim for costs, including assertions about the "cost heavy" process through which they said their clients had been put and about the conduct of the Board during the course of the various appeals to D&B and the review process by the Board. This letter was not copied to the Board, nor was a copy sent to the Board by the Ombudsman.

(h) The Board's letter of 3 December 2012 responding to the Ombudsman's preliminary conclusions made no reference to the issue of costs, which was not surprising given the preliminary conclusion reached on that issue and

the fact that the Board had not been copied into or sent the Trustees' solicitors' letter of 17 October 2012.

(i) Without seeking any further submissions on the costs issue from the Board, and obviously having taken into account the contents of the Trustees' solicitors' letter dated 17 October 2012, the Ombudsman changed her preliminary conclusion on that issue in giving the ruling set out in paragraph 171 above.

(ii) The Ombudsman's submissions

174. On behalf of the Ombudsman, Mr Evans relied on the same central point as had been made by Mr O'Brien in his letter of 2 May 2012. Regulation 16(2)(b)(iii) of the PPF Ombudsman Regulations gives the Ombudsman the power to direct the Board *"(aa) to pay such compensation as he considers appropriate to such person as he considers appropriate"* and *"(bb) to take or refrain from taking such other steps as he may specify"*. He argued that either of these is wide enough on its terms to cover a direction that the Board pay a contribution towards the legal costs of the Trustees after they had successfully made a reference to the Ombudsman against a decision of the Board in the review process and also therefore (in effect) against a decision of D&B during its internal appeals process.

175. Mr Evans further argued that the fact that certain other provisions in the PPF Ombudsman Regulations which relate specifically to costs (see below) are too narrow in their scope to cover the facts of this case is no reason to impose an artificially (as he would put it) narrow construction on the scope of Regulation 16(2)(b)(iii)(aa) or (bb) and that to do so would largely strip Regulation 16(2)(b)(iii) of any effective content in the context of this case.

176. He also sought to draw an analogy between the position here and that which applies on complaints made to the Pensions Ombudsman. As he put it in his skeleton argument:

"The Pensions Ombudsman does not have any express statutory power to award costs (even in respect of oral hearings). But, like the PPF Ombudsman, his jurisdiction is widely expressed: he can direct a person responsible for the management of the scheme to which the complaint relates 'to take, or refrain from taking, such steps as he may specify' (s.151(2) Pension Schemes Act

1993). The Pensions Ombudsman does not usually make an award of costs, but has on occasion done so (see, by way of example only, the Pensions Ombudsman's determinations in Hopwood (81492/1) at §38 and Lyndon-Stanford (73999/2) at §22)."

177. Mr Evans acknowledged that neither his construction of this aspect of the Regulations nor that of the Board produced an entirely satisfactory result, the problem on his approach being that the power to award costs against the Board in the case of a reference involving an oral hearing is much narrower than that applicable to a reference not involving an oral hearing because of Regulation 15(3) (see below). He accepted that this creates a distinction between the position of the Ombudsman and that of the Pensions Ombudsman, where there is no equivalent to Regulation 15(2). However, overall, he submitted that his was the "least bad" solution to this construction issue.

(iii) The Board's submissions

178. As I understood his submissions, Mr Giffin did not dissent from the conclusion that, absent other provisions in the PPF Ombudsman Regulations, the power to award *"compensation"* under Regulation 16(2)(b)(ii)(aa) would be wide enough in scope to cover the award of costs made in this case. However, he pointed to the existence of specific provisions in the PPF Ombudsman Regulations dealing expressly with costs as indicating that Regulation 16(2)(b)(ii)(aa) should not be construed as having the scope contended for by the Ombudsman, as follows.

179. There are only limited situations in which the Ombudsman is explicitly empowered by the PPF Ombudsman Regulations to award a party costs:

(a) Under Regulation 15(2) there is a power for the Ombudsman herself to pay a party's costs and expenses in cases where an oral hearing is held and those costs and expenses have been incurred with the prior approval of the Ombudsman;

(b) Regulation 15(3) provides as follows:

*"**Where an oral hearing is held** and the PPF Ombudsman is of the opinion that -*

*(a) the applicant, the Board, any person notified of the reference under regulation 5(1)(b) or any person to whom notice of the hearing was sent under regulation 11(2)(c) **acted vexatiously**;*

> *(b) the **conduct** of the applicant in making or pursuing the reference **was unreasonable**; or*
>
> *(c) the **conduct** of the Board in opposing the reference **was unreasonable**,*
>
> *he may direct the person who acted, as the case may be, vexatiously or unreasonably to pay any such person as is mentioned in paragraph (2)(a) to (e)* [this list includes the referral applicant] *such amount as the PPF Ombudsman considers is reasonable in respect of the costs and expenses reasonably incurred by that person, with the prior approval of the PPF Ombudsman, in connection with that person's attendance at the hearing"* (emphasis added).

180. Mr Giffin argues that one must construe the PPF Ombudsman Regulations Regulations as a whole and that, in view of the very limited powers to awards costs contained in Regulation 15, Regulation 16(2)(b)(ii)(aa) cannot have been intended to permit the Ombudsman to award costs on any reference in which she concludes that the decision of the Reconsideration Committee on a reviewable matter was not reached correctly.

181. Finally, Mr Giffin argued that, even if the Ombudsman was correct in concluding that she had jurisdiction to award costs under Regulation 16(2)(b)(ii)(aa), having reached the preliminary conclusion that she would not exercise her discretion to do so, she should have given the Board the opportunity to respond to the Trustees' solicitors' letter of 17 October and to make its own submissions on the exercise of that discretion before reaching her final conclusion. He submitted that the course taken by the Ombudsman in this respect amounted to a *"very blatant disregard of the rules of natural justice"*.

(iv) The Trustees' submissions

182. The Trustees made no additional submissions to those made on behalf of the Ombudsman on the question of whether the Ombudsman had jurisdiction to make an award of costs. In relation to the "lack of natural justice" argument of the Board, they submitted that, given the low level of the award of costs, the Ombudsman was entitled to take the view (having decided that she had jurisdiction) that she could make an award at this low level without having to re-consult the Board on the issue, or on the amount.

(v) Conclusions on the Costs Issue

183. As was acknowledged by Mr Evans, the jurisdiction question is not amenable to a straightforward answer and, on one view, neither outcome is entirely satisfactory. However, on balance, I have concluded that a modified version of Mr Evans' proposed construction of Regulation 16(2)(b)(ii)(aa) is to be preferred over the construction contended for by Mr Giffin.

184. I was at one point in argument inclined to the view that Regulation 15(3) created a seemingly insuperable difficulty with Mr Evans' approach. Even in references involving an oral hearing (which of course is not this case) there is no general power under Regulation 15(3) to order that the costs of a successful party be paid by another party and, specifically, the Board may only be ordered to pay the applicant's costs under Regulation 15(3) if it has acted vexatiously or unreasonably in opposing the reference. It is to be noted that, even then, the Ombudsman may only order a payment in respect of a person's costs reasonably incurred in connection with that person's attendance at the hearing. In other words, had an oral hearing taken place in this case, had the Trustees succeeded (as they did on paper) and had the Ombudsman decided that the Board had acted vexatiously or unreasonably, none of the £89,000 costs claimed by the Trustees in the referral application would have been recoverable under Regulation 15(3), because all of these were, and it seems likely would in any event have been, incurred otherwise than in connection with the Trustees' attendance at an oral hearing. In such circumstances, how could Regulation 16(2)(b)(iii) be relied on to achieve a solution that could not be achieved under Regulaton 15(3)?

185. However, on further consideration, it seems to me that the solution is as follows.

    (a) Regulation 15(3) clearly governs the position as regards costs incurred in connection with attendance at oral hearings and cannot be circumvented by relying on Regulation 16(2)(b)(iii) as regards such costs.

    (b) Furthermore, given that it was thought necessary and appropriate to make specific provision in the PPF Ombudsman Regulations for the making of an award of costs in limited circumstances in relation to attendance at oral hearings, yet no specific provision of any sort was made in relation to the costs incurred as a result of applying for a reference or putting written

representations before the Ombudsman, I think it must be concluded that such costs (i.e. all costs of the reference other than those incurred in connection with attendance at an oral hearing) were not intended to be recoverable by a successful party.

(c) This conclusion as to costs relating to the reference seems to me not only to be correct as a matter of pure construction of the material parts of the PPF Ombudsman Regulations as a whole, but also sensible in terms of outcome if (as was indicated by Mr O'Brien in his letter to the Trustees' solicitors dated 30 April 2012) *"This office provides a free service, free from the risk of costs inherent in court proceedings. Our procedures are designed to be used without professional assistance."*

(d) That said, this is no reason in my view why the Ombudsman should not exercise her powers under Regulation 16(2)(b)(iii) to make an award of *"compensation"* (under sub-paragraph (aa)) or order the Board to *"take the step"* of making a payment to the Trustees in respect of matters that have occurred otherwise than in connection with the bringing of the reference, where the conduct of the Board has caused the Trustees to incur expenditure which it ought not to have been required to incur or otherwise merits such an award or order.

186. In the circumstances, on the hypothetical premise that she had rightly concluded that the Reconsideration Committee's substantive decision had not been arrived at correctly, the Ombudsman did, in my judgment, have the power under Regulation 16(2)(b)(iii) to order the Board to compensate the Trustees in respect of such part of their costs or expenses which were incurred otherwise than in connection with the bringing of the reference. Although it was, in the end, a matter for her to decide whether to compensate the Trustees just in respect of part or all of the costs of the review process undertaken by the Board, or whether to extend the compensation to cover part or all of the costs of the internal D&B appeals procedure, I do not think she was confined to the former as a matter of principle. It seems to me that, where the Trustees have been put to substantial expense in unsuccessfully seeking to persuade D&B to change a Failure Score which the Trustees ultimately successfully establish in front of the

Ombudsman was incorrect, that is potentially as much a compensatable expense as the expense incurred in unsuccessfully undertaking the Board's review procedure.

187. Finally, although as I have concluded above, the Ombudsman did have the power to make such an award of compensation against the Board, I consider that the Ombudsman was wrong in principle in not sending the Board a copy of the Trustees' letter of 17 October 2012 and giving them an opportunity to make substantive representations on the issue of what, if any, costs should be awarded. My reasons can be summarised as follows.

(a) Even though the Board was put on notice by the Trustees' referral application that the Trustees were seeking an award of costs, that application contained no substantive representations on the jurisdiction issue or as to the merits, the Board was not copied in on or sent the subsequent correspondence from the Ombudsman to the Trustees' solicitors about costs (see paragraph 173(c) and (d) above), the Ombudsman's preliminary conclusions indicated that she would not make an award of costs and the Board was not copied in on or sent the Trustees' solicitors' letter dated 17 October 2012.

(b) The Ombudsman says in paragraph 17 of her witness statement that *"Comments on preliminary conclusions are not routinely copied to the parties. They are normally copied if they are thought likely to materially change the outcome of the substantive referral"*.

(c) I accept that it may not be necessary or appropriate for other parties to be copied in on all correspondence passing between the Ombudsman and an individual party and that, in some circumstances, this may include comments made on the preliminary conclusions particularly if these are simply reiterating points essentially already made or concern issues on which the other party has already said all that is likely to be able to say. However, the Trustees' solicitors' letter of 17 October 2012 contained detailed and potentially "game changing" submissions of obvious significance to which the Board, as a matter of natural justice, should have been given the opportunity to respond, regardless of the level of costs the

Ombudsman was minded to award as a result of receiving the Trustees' submissions. The fact that these were only likely to alter the Ombudsman's conclusions on costs (as indeed they did), rather than the outcome of the *"substantive referral"* is not, with respect, really to the point where the consequence was that, in relation to a matter on which the Ombudsman was minded to give a direction contrary to the interests of the Board, she had only heard substantively from one party.

Conclusions

188. For the reasons given above, this appeal should be allowed. I have reached the following conclusions on the individual issues:

(a) On the **Construction Issue** (see paragraphs 8(a) and 49 above), the Ombudsman made an error of law in that the Board's Reconsideration Committee correctly decided that the Failure Score assigned to the Scheme Employer by D&B Luxembourg and used in the Scheme's Levy Calculation was the Failure Score that the Board was required to use under the terms of the 2010/11 Levy Determination. To the extent that the Ombudsman considered the proper construction of Rule E2.2(3) of the 2010/11 Levy Determination, she reached the wrong conclusion. She also reached the wrong conclusion in relation to the construction of Rule B2.

(b) On the **Remission Issue** (see paragraph 8(b) above) if (contrary to my view on the Construction Issue) the Board had a discretion in the circumstances of this case to use a different Failure Score to that assigned by D&B Luxembourg and used in the Scheme's Levy Calculation, her general powers under Regulation 16 of the PPF Ombudsman Regulations extended to the making of a direction to the Board determining how it should exercise that discretion. However, in the circumstances of this case, it would not have been appropriate for her to have made such a direction and she should have remitted the matter to the Board for it to exercise that discretion.

(c) On the **Merits Issue** (see paragraph 8(c) above), it is not necessary in view of my findings on the Construction and Remission Issues to reach a

concluded view. My provisional view is that there were grounds for concluding that the Ombudsman's exercise of the discretion (if that is in fact what she was purporting to do) was open to challenge on appeal to this court.

(d) On the **Interest Issues** (see paragraph 8(d) above), because the separate reviewable matter of the Board's decision as to interest was not referred to the Ombudsman she had no jurisdiction to make the direction she made in paragraph 53 of the Determination.

(e) On the **Costs Issues** (see paragraph 8(e) above), the Ombudsman had the power under Regulation 16(2)(b)(iii) of the PPF Ombudsman Regulations to order the Board to compensate the Trustees in respect of such part of their costs or expenses which were incurred otherwise than in connection with bringing of the reference. In principle, this could have included part or all of the Trustees' costs of both the internal D&B appeals procedure and the review process undertaken by the Board. However, I consider that the Ombudsman was wrong in principle in not sending the Board a copy of the Trustees' letter of 17 October 2012 and giving them an opportunity to make substantive representations on the issue of what, if any, costs should be awarded.