FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 9
P225/20

Lord President
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the petition by

PLUMBING PENSIONS (UK) LIMITED

Petitioner

for

Directions under section 6(vi) of the Court of Session Act 1988 and at common law

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Petitioner: Howlin QC, Roxburgh; Pinsent Masons LLP

2 March 2022

Introduction

[1] The Plumbing and Mechanical Services (UK) Industry Pension Scheme ("the Scheme") is an occupational pension scheme designed to provide pensions for persons employed in the plumbing trade throughout the United Kingdom. It was established by an interim trust deed dated 5 November 1974 and a definitive trust deed dated 28 December 1977 ("the Trust"). The petitioner is the sole trustee of the Trust. The Scheme and its rules ("the Rules") have been amended from time to time. It is governed by standard pensions legislation, notably the Pensions Act 1995, the Pensions Act 2004 and the Occupational

Pension Schemes (Employer Debt) Regulations 2005 (SI No 678). The administration of the Scheme is carried out by Plumbing Pensions (UK) Administration Ltd ("PPA"), but the petitioner as trustee controls that administration. The Scheme is a defined benefit multi-employer non-segregated occupational pension scheme. It began operating in 1975. It was set up by two trade organisations involved in the plumbing industry (the Scottish & Northern Ireland Plumbing and Employers' Federation ("SNIPEF)" and the National Association of Plumbing, Heating and Mechanical Services ("the Association")) and by the Electrical Electronic Telecommunication & Plumbing Union (now Unite the Union ("the Union")) with a view to providing pensions for the employees of members of SNIPEF and the Association. It was designed to allow employees moving between participating employers to have continuous pension accrual (in popular parlance, a portable pension). The petitioner has been the sole trustee of the Scheme since its inception. It has received no remuneration.

[2] The Scheme was closed to new members and to the accrual of future benefits with effect from June 2019, and the longer term business plan is expected to lead to the eventual closure and winding up of the scheme. As of November 2020 the Scheme was one of the largest industry-wide defined benefit schemes in the United Kingdom, with assets of approximately £2.3 billion, 350 participating employers, and approximately 34,000 members (21,000 having deferred benefits and 13,000 receiving pensions).

[3] The petition seeks an order from the court giving directions to the petitioner. The primary question is whether the petitioner is entitled to have recourse to the indemnity set out in the Rules in order to discharge sums which may be or become due by it in respect of the expenses of litigation incurred by the petitioner or by PPA, or any sums awarded against the petitioner or PPA, in respect of liabilities arising in connection with debts due by

employers in terms of section 75 of the Pensions Act 1995 (as amended) and the related regulations ("section 75 debts").

[4] Prior to a hearing on the summar roll the petitioner lodged detailed written submissions along with a substantial number of productions. At the summar roll hearing on 23 July 2021 senior counsel for the petitioner made oral submissions. After the hearing senior and junior counsel intimated further written submissions, which the court also considered. We shall refer to some of those submissions later.

[5] On 9 September 2021 the court accepted that the petition is competent but refused *in hoc statu* to give the directions sought. It explained why in a Note of the same date. Without the benefit of a contradictor or some independent input, the court had reservations as to whether it could be entirely confident that the information provided to it was a full and objective picture. Arguably, there might be a conflict of interest between the petitioner's interests in establishing that it was not guilty of wilful wrongdoing or gross negligence, and its duty, as trustee, to preserve the trust assets and to act in the interests of the Scheme. The court observed that a new trustee would not have any such conflict of interest. It could carry out such further investigations as it saw fit in order to ascertain whether the material produced to the court to date accurately and completely reflects the true position. It would be entitled to be indemnified from the Scheme for the expenses of litigation and any awards of damages. It could litigate free from concerns over whether it might not be indemnified. Nevertheless, in paragraph [17] of the Note the court noted:

> "[17] The court appreciates that the appointment of a new trustee may not be straightforward. It may be that an alternative would be for the court to appoint a reporter to investigate the matter and to report. The comparative expense and convenience of such a course is for the petitioner to assess. In the absence of any submissions, the court will make no further observation on that possibility at present."

[6] On 17 November 2021, on the petitioner's motion the court remitted the petition to a reporter (Lord Drummond Young) to investigate and report on whether the material produced to the court to date accurately and completely reflects the true position in relation to (a) the matters set out in the petition; (b) the question of whether the petitioner's conduct amounts to wilful wrongdoing, or is such as to deprive it of the entitlement to have recourse to the indemnity under rule 22.2; and (c) any other matters which the reporter considered pertinent to the directions sought in the petition.

[7] The reporter has now submitted a clear and comprehensive report. He was provided with (i) all of the bundles, containing the pleadings, evidence and authorities, lodged with the court; (ii) copies of senior counsel's written submissions and supplementary submissions; and (iii) the Note issued by the court on 9 September 2021. The reporter met the current chairman of the petitioner (Mr Jonathan Bridger) and the chief executive and company secretary of the petitioner and of PPA (Ms Kathleen Yates) in order to obtain their comments on the issues raised in the petition. He is satisfied that he received all the information necessary to provide a full report dealing with the issues remitted to him.

Legislative background

[8] Historically, if a pension scheme was wound up or a participating employer became insolvent there was no statutory requirement on the employer or its insolvent estate to make good any deficiency in the assets of the scheme. From 1992 onwards this changed. Section 58B of the Social Security Pensions Act 1975 (as amended) provided that a debt became due by an employer if a pension scheme in which it participated was wound up, or if the employer was subject to liquidation or became bankrupt, and the scheme was in deficit. The Pensions Act 1995 comprehensively revised and consolidated the existing

legislation. Section 75 introduced what became known as the "Employer Debt" regime, under which an employer became liable in certain circumstances to pay a debt of a prescribed amount to any pension scheme in which it had participated. The amount paid in respect of such debts was originally calculated on the "minimum funding requirement" basis ("MFR"). That was based on expected returns from gilts in the case of pensioners and equities in the case of other members. However, in 2005 the method of calculation of section 75 debts was changed to the "buy-out" basis, which represents the costs of buying out the benefits with an insurance company. That was a radical shift. It placed a considerably higher value on pension liabilities than the MFR basis, because insurers normally "back" the liabilities that they insure with low-risk assets of long duration, and in addition must reserve additional cover to meet regulatory requirements and a required profit margin. In consequence section 75 debts could become payable in cases where both the scheme and the employer continued in existence and no insolvency event had occurred.

Answers to the petition and claims against the petitioner

[9] The petition is particularly concerned with the risk of litigation arising out of claims for section 75 debts by the Scheme against employers. Answers to the petition were lodged by the Plumbing Employers Action Group Ltd ("PEAG") and NG Bailey Ltd.

[10] PEAG was formed in 2016 as an action group. In its answers PEAG raised concerns about the petitioner's approach to compliance with section 75, and in particular with the manner in which that approach changed over time, and with what PEAG described as a poor governance structure and a failure to comply with the law.

[11] NG Bailey has been an employer member of the Scheme since September 2001. In its answers it contended that in failing to seek payment of section 75 debts the petitioner had

breached the fiduciary duties incumbent upon it as trustee. It averred that the petitioner should either resign as trustee or explain what steps it intended to take to avoid any conflict of interest in taking action to remedy its breach of fiduciary duty. It also averred that the rule 22.2 indemnity did not extend to losses caused by the petitioner's breach of fiduciary duty or negligence.

[12] On 9 March 2021 the court granted NG Bailey's motion to withdraw its answers, and on 23 March 2021 the court granted a similar motion by PEAG.

[13] Proceedings in the Court of Session have been brought against the petitioner by two employers who were members of the Scheme. Both claims are made against the petitioner as an entity in its own right rather than as trustee of the Scheme.

[14] In the first action J Mills (Contractors) Ltd seeks (i) declarator that it entered into a valid Scheme Apportionment Arrangement with the petitioner on about 22 June 2010 in terms of which Mills' liability was limited to £1; (ii) reduction of a section 75 debt notice and an actuarial certificate dated 21 August 2019 issued to it by the petitioner (in terms of which the section 75 debt is said to be £851,800); and (iii) interdict against any attempt to enforce the section 75 debt notice.

[15] In the second action Kamco Ltd sues the petitioner and Mr Alan Pickering (a director and former chairman of the petitioner). Kamco seeks declarator that, in the event that it requires to pay a section 75 debt, the petitioner and Mr Pickering will be obliged to make payment to Kamco of a like amount by way of damages. It also seeks payment of £260,576, which is said to be the amount of the section 75 debt. It avers that the petitioner, acting through one of its officers, encouraged it to participate in the Scheme without advising it (a) that the petitioner had not taken appropriate steps to see that section 75 debts were

collected, and (b) that the extent of participating employers' section 75 liabilities was then unknown. It avers that that was a wilful failure by the petitioner.

[16] In view of the formation of the action group and correspondence received by the petitioner, it considers it likely that further employers may raise similar actions.

[17] The criticisms made by employers fall into four broad categories. First, PPA gave incorrect advice that employers exiting the scheme had no liability for section 75 debts beyond the sum of £1.00 apportioned to them under rule 28.1 (discussed below). Second, between 2010 and 2016 PPA gave erroneous advice that incorporation of an employer would not trigger section 75 debts. Third there was the potential for conflicts of interest arising because the same persons were directors of the petitioner and of the PPA. Fourth the delay in issuing the section 75 debt notices. Prescription issues have also been canvassed, both in relation to the obligations of particular employers to pay section 75 debts and in respect of obligations which the petitioner might have to make reparation to particular employers.

Rule 22

[18] Rule 22 of the Rules provides:

> "22.2 Indemnity
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> The Trustee … will be indemnified against any expenses and liabilities which are incurred through acting as the trustee of the Scheme out of the Scheme's assets and will have a lien on the Scheme's assets for such indemnity. This indemnity does not apply to expenses and liabilities which are incurred through wilful wrongdoing or covered by insurance under Rule 22.4.
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> 22.3 Limit on liability
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> The Trustee … will not be liable for any breach of trust other than a breach of trust knowingly and wilfully committed.
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> 22.4 Trustee insurance
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> … [T]he Trustee may … insure itself … against liability for breach of trust not involving wilful wrongdoing".

The reporter's discussion of the applicable law

[19] The reporter discusses the rule 22.2 indemnity and the rule 22.3 limitation of liability at paragraphs 76-77 and 79-82 of the report:

> "76. …. According to their literal wording, the indemnity and limitation of liability are only excluded in cases involving wilful wrongdoing, or breaches of trust that are knowingly and wilfully committed. That wording suggests that before the indemnity or limitation can be held inapplicable there must be an intention on the part of the trustee to act wrongfully or in breach of trust. That would in my opinion clearly involve bad faith on the part of the trustee. In such a case the indemnity and limitation would certainly be excluded. … Bad faith clearly goes beyond the mere maladministration of the trust, even on a prolonged or systematic basis; it rather involves a total lack of concern by the trustee as to the trust's administration….
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> 77. Nevertheless, rule 22.2 and rule 22.3 are subject to an important general rule of the Scots law of trusts. In Scots law, indemnity and immunity clauses contained in a trust deed are valid and enforceable in respect of ordinary breaches of trust, including negligent breaches of trust. They are not available, however, in respect of three categories of breach of trust: those that involve fraud or dishonesty; those where the trustees can be said to act in bad faith, and those involving gross negligence or *culpa lata*. It is accordingly essential, in considering the extent to which an indemnity or immunity clause or a clause limiting trustees' liability applies to a particular breach of trust, to determine whether that breach of trust falls into any of the three foregoing categories, fraud, bad faith and gross negligence, or whether it merely amounts to ordinary negligence. If the breach of trust falls into any of those three categories, the indemnity or other clause will be ineffective as a matter of law. For this purpose it is immaterial that the indemnity or immunity clause according to its terms relates only to wilful wrongdoing.
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> …
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> 79. The most extensive recent discussion of the law relating to gross negligence and trustee immunity and indemnity clauses is found in the Scottish Law Commission's Report on Trust Law (Scot Law Com No 239) (August 2014) in the chapter on Breach of Trust, at paragraphs 12.23-12.54. In my opinion the law is accurately set out in that discussion. The exception for gross negligence is clearly established by a number of cases, notably *Seton* v *Dawson*, 1841, 4 D 310, at 316-317 per Lord Cockburn, *Knox* v *Mackinnon*, 1888, 15 R (HL) 83, at 86 per Lord Watson, *Raes* v *Meek*, 1889, at 16 R (HL) 31, at 35, per Lord Herschell, *Clarke* v *Clarke's Trustees*, 1925 SC 693, at 707 per LP Clyde, and *Lutea Trustees Ltd* v *Orbis Trustees Guernsey Ltd*, 1997 SC 255, at 264 per Lord McCluskey and at 268 per LJC Cullen. The exception for gross negligence has been the subject of criticism by English judges, in cases which are referred to in the Report on Trust Law at paragraphs 12.24 and 12.25. In my opinion that criticism is misplaced, for the reasons discussed at paragraphs 12.26-12.29 of the Report. The essence of the gross negligence exception is perhaps this, that is a person accepts

office as a trustee, no clause in the trust deed can permit him to ignore his basic duties in that office.

80. It is important in my opinion to have regard to the fundamental rationale for the exception for gross negligence. In the present case counsel for the petitioner, in his written submissions, emphasises the fact that gross negligence is equiparated with fraud, and he therefore submits that something akin to fraud is required before negligence can be said to be "gross". It is quite correct that the consequences of gross negligence and those of fraud are equiparated: an immunity or indemnity clause is invalidated, which may of course have a disastrous financial impact on the trustee. I am nevertheless of opinion that it is the consequences that are equiparated, not the concepts themselves. Negligence, even gross, is not the same as fraud. Nevertheless, the fact that the consequences are equiparated does emphasise the very serious nature of the conduct that is required before negligence could be considered gross. This point is I think important; it indicates that negligence in looking after the affairs of a trust, even repeated negligence, should not lightly be held to be gross negligence.

81. The proper rationale of the exception for gross negligence is in my view set out at paragraph 12.30 of the Report on Trust Law: "[P]roviding immunity against gross negligence is fundamentally at variance with the concept of trust. A trustee is appointed to take a responsible attitude towards the assets under his or her charge, and to permit the trustee immunity from serious lack of attention to the affairs of the trust or serious mismanagement of its affairs appears… to negative that fundamental aspect of the position…. The present objection goes to the very essence of trusteeship, and seems to us to be so fundamental that exclusion of liability for gross negligence, and obviously fraud, cannot be permitted". I would draw attention in particular to three aspects of this statement of the law. First, gross negligence involves a fundamental disregard for the duties of the office of trustee; that is what is at variance with the concept of trust. Secondly, the exception for gross negligence relates to serious lack of attention to the affairs of the trust or serious mismanagement of its affairs; a mere failure to deal with one particular problem does not normally fall within this category. Thirdly, the critical point is that, if conduct is to amount to gross negligence, it should be such as to negate the notion of trusteeship. Gross negligence is a serious matter.

82. If that is correct, the essential feature of gross negligence is that it involves a failure to engage with the basic duties of trusteeship, for example through a persistent and serious lack of attention to the affairs of trust or persistent and serious mismanagement of its affairs or assets. There is to some extent a connection with the exception for bad faith; what is required is conduct by the trustee that shows a serious disregard for the essential task that a trustee has, of managing property for the benefit of others. Gross negligence requires something akin to a formal abdication of responsibility."

[20] We are satisfied that this is an accurate statement of the relevant legal principles.

The facts

[21] On the basis of the materials we have seen and the reporter's findings we summarise the facts as follows.

[22] When the Scheme was set up in 1975 multi-employer schemes were regarded as the best way to provide pensions in industries where employees regularly moved between employers. They were seen as the best way of securing economies of scale, and of addressing the problem that those who changed jobs frequently were adversely affected by the way in which single employer schemes were set up.

[23] Four important features of the Scheme differ from typical occupational pension schemes. First, the plumbing industry is characterised by a very large number of very small businesses almost all of which have few employees. Second, an exceptionally large number of employees are involved in the Scheme (34,000 at present). Third, the identity of the employers in the Scheme has inevitably changed over the years as some businesses have ceased trading and terminated employment contracts and other businesses have begun to trade and engaged employees. Fourth, formal documentation was regularly found to be seriously deficient, *eg* where a business carried on by a sole trader was passed from father to son, with minimal formality, or a business ceased to trade and disposed of all of its assets by paying its debts and making surplus assets over to the owner. A result of these features is that the employers in the Scheme were a very large and fluctuating body. The same was true of the members of the Scheme (present and former employees).

[24] The Scheme is under the control of an independent trustee, the petitioner, and is administered by PPA. For practical purposes PPA functions as an agent of the petitioner, but the Scheme is more akin to a mutual scheme than to schemes administered by an

independent life and pensions company because the petitioner has no assets of its own. All of the assets under its control are held by it in trust for the purposes of the Scheme.

[25] If a claim is made against the petitioner itself (as opposed to a claim against the trust estate), unless the claim is covered by the petitioner's insurance the only assets available to satisfy it or meet the expenses of resisting it are those held in trust by the petitioner for the purposes of the Scheme; and those assets are only available if the petitioner is entitled to have recourse to the indemnity in rule 22.2.

[26] The petitioner's insurance is provided on a "claims made" basis, as distinct from a "claims arising" basis. That was the position with the policies in force when the two claims which have been made to date were intimated, and it is the position with the current policy. Those previous policies were, and the current policy is, subject to a specific exclusion for loss arising from or attributable to or in any way connected with section 75 employer debts. The current policy also has an excess of £250,000.

[27] The Scheme was under the governance of its directors, who met quarterly. SNIPEF and the Association each nominated two directors, and the Union nominated three directors. Those nominated directors were not remunerated, but payments were made in respect of their services to the bodies which they represented. There have also been one, and latterly two, independent executive non-voting directors who have received director's fees. The Scheme Actuary dealt with actuarial matters. Apart from the chairman, Mr Pickering (who was appointed by the Electrical and Plumbing Trade Union to the board of the petitioner in 1981 and was chairman of the petitioner between 2001 and 2020), the directors had no specialist knowledge of pension and investment matters. They were trade union, or retired trade union, officials or active or retired members from the plumbing industry. The directors relied heavily on input from professional advisers: Mercer, and subsequently

Watson Wyatt, Towers Watson and Willis Towers Watson as actuarial advisers, and Linklaters as the main legal advisers. Pinsent Masons became additional legal advisers in 2015. In addition, the directors placed considerable reliance upon the Scheme's pensions manager, Mr Robert Burgon, who was also the petitioner's company secretary.

[28] While the Scheme and the petitioner have continued as legal entities since 1975, the individuals responsible for running them have changed. With the exception of Mr Pickering, those now in charge had no connection with the Scheme until about 2005, when Ms Yates became involved to a limited extent as an employee of the Scheme's actuaries. In 2013 she became the Scheme Actuary. In 2015 she resigned as Scheme Actuary and joined the Scheme in-house as its Deputy Pensions Manager. On 1 December 2016 Mr Burgon retired and Ms Yates succeeded him. She became chief executive and company secretary of the petitioner and of PPA. The other trustee directors were appointed at various dates between 2006 and 2021, and the present trustee chairman, Mr Bridger, assumed that office in September 2020 having been an independent director since 2017.

[29] The petitioner recognises that the Scheme's governance structure is out of date and needs overhauled. Since 2017 some modest modernisation has taken place. There are now two independent non-voting directors appointed by the board, one of whom is Mr Bridger. More radical change is being actively considered. A new structure may involve the use of a greater number of independent executive directors with directly relevant professional experience, with board meetings taking place more frequently. The reporter describes the proposed new structure in more detail in para 71 of the report.

[30] From 1997 to 2005 section 75 debts were calculated on the MFR basis. As the Scheme was always funded well above MFR requirements no section 75 calculations were needed.

In any case, the information which would have been required to carry out section 75 calculations was not thought to be available in the Scheme's records.

[31] When the change to a buy-out basis occurred in 2005, the Scheme could no longer be viewed as being funded well above the valuation requirements, and it could no longer be said that section 75 calculations were unnecessary because the fund was in surplus. The Scheme Actuary advised Mr Burgon that the legislative changes could have major implications for the Scheme. He recommended that the Scheme should take legal advice. The petitioner obtained advice from Linklaters in August 2005. The petitioner's actuarial advisers expressed concern that its data records would not enable it to allocate section 75 debts accurately to particular employers.

[32] Orphan liabilities are ones that cannot be attributed to a current participating employer in a scheme. They are particularly significant in the Scheme because over its 45 year history employers regularly joined and left. A large proportion of its orphan liabilities arose because employers were able to join and leave the Scheme in the first 30 years of its existence before employer debt legislation existed or before compliance became an issue for the Scheme. However, as the employer debt legislation was retrospective in its effect, employers who left the Scheme after September 2005 were required to contribute towards the pension liabilities for all the employers who left the Scheme in the 30 years before that month, when either the present pensions legislation did not exist, or debts were calculated by reference to the MFR. As soon as section 75 debts had to be calculated on a buy-out basis the impact of orphan liabilities more than doubled the section 75 debts that such employers had to pay.

[33] When the legislative changes took effect in 2005 the petitioner recognised the serious difficulties which the changes entailed. Its initial response was to propose that the law be

reformed so that it would not apply to the Scheme. That proposal was unsuccessful. Thereafter, between 4 June 2007 and 4 April 2009 the petitioner applied a Scheme Apportionment Rule (rule 28.1 of the Rules current during that period) which permitted a departing employer's share of the Scheme's excess of liabilities over assets to be apportioned as to £1 to that employer with the remainder of the share being apportioned to those employers who continued in the Scheme. However, with effect from 5 April 2009 the law changed so that the written consent of the continuing employers to such an apportionment became necessary. In consequence that workaround was no longer a practicable solution.

[34] Until 2014 the petitioner's understanding, and the advice it received, was that the data required to calculate the section 75 debts - and in particular the dates of employers joining and leaving the Scheme - did not exist, or at least that it could not be accessed. It transpired that this was incorrect.

[35] By 2013 the Pensions Regulator had sought an explanation from the petitioner about what it was doing in relation to section 75 debts. Following inquiries, Ms Yates discovered in early 2014 that, contrary to the petitioner's previous understanding, the administration system did record the dates when most employers joined and left the Scheme. During the remainder of 2014 and during 2015 further investigations were carried out.

[36] In April 2016 the petitioner wrote to all the employers who had used the Scheme since September 2005 to tell them about section 75 debts. Proposals were made as to calculation, and feedback was requested. During 2016 the Scheme ran employer forums. Since then considerable time has been spent improving the employer database, and there has been regular communication with employers.

[37] The ability to extract section 75 data depended upon the evolution of the Scheme's administration system. The data required to calculate section 75 debts is "employer-

centric", whereas the Scheme's records were kept in an "employee-centric" manner. Considerable work was required to transpose the Scheme's data, and various difficulties were encountered. The system had to be rebuilt almost from scratch. For example, certain data was only held on microfiche. Getting that information scanned into PDF format took more than 3 months. An employee was recruited to work on transposing microfiche records from scanned PDFs to a spreadsheet to record historic employer data and to link spouses' records to member records. This took nearly a year. Dependents' pensions had not previously been linked to members, but this was required in order to allow liabilities for dependents to be attributed to a Scheme employer. Problems also arose with employer reference numbers. So, while much of the data necessary to calculate section 75 debts was in the administration system or recorded on old microfiche or paper records, it required a significant amount of manipulation to get it into a format that the Scheme Actuary could use to calculate section 75 debts. In short, the data was there all along but it took time for the petitioner to learn (i) that it existed at all; (ii) that it could be extracted from the system; and (iii) that a major rejig of the system was going to be needed in order to do that.

[38] The Scheme began to issue section 75 debt notices to employers in early 2019. Thirty-six section 75 debts totalling £25.4 million were certified to 1 June 2021. In addition there were 22 cases where a debt has been calculated but not certified; those debts total £32.6 million. In practice the amount collected has been very small because many employers have been permitted to defer the time that they need to pay, or have transferred the section 75 debt to a different Scheme employer (where such employer has assented). As at 1 June 2021, only 12 employers had paid their section 75 debt and four had requested a payment plan. The total debt collection to date is £4.5 million.

The reporter's conclusions

[39] The reporter opines that there is no arguable basis for stating that the trustee, or its officers, have ever acted in bad faith (paragraphs 76, 78); and that there is no suggestion of fraud or dishonesty (para 78).

[40] Before us the petitioner accepted that its governance of the Scheme was, and is, defective. It had been an error to refrain from taking steps to call up the debts in the hope that Parliament would amend the legislation. It should have challenged the advice that it was impossible or impracticable to retrieve the necessary data from the scheme's records. It should have exercised more supervision over its pensions' manager, Mr Burgon, and the day-to-day actings of PPA. However, those errors required to be viewed through the prism of the petitioner receiving expert professional advice and against the inherently flawed governance structure of the Scheme. The practice of constituent bodies appointing non-specialist directors, thereby creating a board which was heavily dependent on expert advice, rendered the petitioner ill-placed to challenge such advice. The failings did not constitute gross negligence. It followed that the petitioner was entitled to rely upon the indemnity.

[41] In the reporter's view the petitioner's failings did not come near to being gross negligence. They did not amount to an abdication of its fundamental responsibilities as a trustee. The petitioner's shortcomings ought to be viewed in context. The Scheme is a complex one, there were large numbers of employers and employees, and employment was often transient. Section 75 debts were an innovation introduced in 1995, and substantially amended in 2005. The legislation undoubtedly increased the difficulties facing the Scheme. The basis for calculating section 75 debts also changed, from MFR to buy-out, leading to the need for a much more active approach to the collection of section 75 debts. The data relevant to the calculations extended over long periods, and it was necessary to go back to

old records which were stored in older, different formats. The petitioner received advice that it was not possible to calculate the section 75 debts on the basis of the data which was available. It was not until substantially later, after 2015, that it became apparent that such calculation was possible. The delays happened at a time when the individuals responsible for the running of the Scheme were in large measure different from those who are now in charge. Professional advice had been taken, and incorrect advice was responsible for a substantial part of the delays. The board of the petitioner were essentially non-specialist. They were not well placed to challenge the internal and external advice which they were given. The Pensions Regulator did not take steps to remove the petitioner as trustee during the delay period, or to interfere significantly with its management of the Scheme's affairs. Those now involved with the Scheme have done their best to ensure that it has been properly administered in a manner consistent with the relevant legislation; and in doing so they have displayed proper standards of care and diligence in administering the Scheme's affairs. The section 75 debt issue was just one relatively small part of the Scheme's administration during the relevant period. There was no significant criticism of the remainder of the petitioner's administration of the Scheme, which generally continued to function as normal. The great majority of the trustee's duties in relation to the Scheme were fulfilled; it was merely one very difficult aspect which provided grounds for criticism.

[42] In the reporter's view the petitioner's conduct as trustee of the Scheme cannot be said to amount to either wilful wrongdoing or gross negligence (para 89); and the court might properly grant the declarators sought in the prayer of the petition (para 92). His ultimate conclusion is set out in para 111 of the report:

> "111. … I can confirm that the material produced to the court to date accurately and completely reflects the true position. It is sufficient to enable me to confirm the accuracy of the averments made in the petition. On that basis I am of opinion that

> neither gross negligence nor wilful wrongdoing is established. If that is so the indemnity in rule 22.2 is available to the petitioner, both at present and following any resignation as Trustee, and if it wishes to do so I am of opinion that the Court might properly grant the prayer of the petition."

[43] For completeness we also record that the reporter discusses conflict of interest (paras 93-104) and possible resignation of the petitioner (paras 105-110). He deals at paras 101-102 and 109 with the concern which the court raised that the interests of the petitioner in having the indemnity and the interests of the Scheme in protecting its assets might arguably be said to be in conflict. In his view there is no such conflict. The preservation of the Scheme's assets is likely in appropriate cases to require participation in litigation, which has to be paid for. Unless the Scheme's assets can be used the interests of the Scheme cannot be vindicated or defended. The petitioner *qua* trustee is acting on behalf of the Scheme and is promoting its interests. The reporter points out that the disadvantages which resignation of the petitioner as trustee would involve outweigh the limited advantages of such a course. The operation of the indemnity in rule 22.2 would still be an issue in relation to claims made against the petitioner. If it applied to the claim the expenses of any litigation and damages would still have to be paid out of Scheme funds. The petitioner could not responsibly resign as trustee until a successor trustee was ready to assume office. Appointing a new trustee would be likely to be a complex process which would take a considerable time.

Decision and reasons

[44] The petitioner now moves for the report to be approved and for the court to pronounce an order in terms of paragraph 3 (under exception of sub-paragraph 3(2)(g), which is not insisted upon) and paragraph 5 of the prayer of the petition.

[45] The principal reason why the court refused *in hoc statu* to grant the directions sought is that, without the benefit of a contradictor or some independent input, it had reservations as to whether it could be entirely confident that the information provided to it was a full and objective picture. At that time the court indicated (para [13] of the Note of 9 September 2021) that if it had been satisfied that the material produced painted the full picture it may have been inclined to determine that the petitioner's conduct did not constitute either wilful wrongdoing or gross negligence and to grant the prayer.

[46] The report provides an independent check on the material which has been produced. It enables the court to be satisfied that it may proceed on the basis of that material and the reporter's findings.

[47] We concur with the reporter that there is no arguable basis for stating that the petitioner, or its officers, have ever acted in bad faith; and that there is no suggestion of fraud or dishonesty.

[48] We also agree with the reporter that although there have been failings in the past on the part of the petitioner in relation to section 75 debts, those failings do not come close to constituting gross negligence. That high threshold was not crossed. There was not a fundamental disregard for the duties of the office of trustee. Looked at fairly and in context, the failings did not involve the sort of serious lack of attention to the affairs of the Trust by the trustee or the sort of serious mismanagement of its affairs which would justify a finding of gross negligence. They were not such as to negate the notion of trusteeship. In arriving at that determination we proceed on the basis that the petitioner's failings continued until at least early 2014. We clarify that because the reporter states at para 12 of the report "that to the extent that there were defects in the administration of the Scheme, they occurred before 2005." It seems likely that the reference to 2005 is a slip and that the date referred to ought

to be 2015. That would be consistent with the remainder of the report (see eg the reporter's conclusion at para 88 that "The major deficiency in the Scheme from 2005 onwards was the failure to address the section 75 debt issue…".

[49] In the whole circumstances we agree with the reporter that the petitioner's conduct as trustee of the Scheme cannot be said to amount to either wilful wrongdoing or gross negligence. Moreover, none of the claims which have been made or are anticipated appear to be claims which are covered by insurance under rule 22.4. The petitioner is entitled to indemnity in terms of rule 22.2 in respect of those claims.

[50] As we are satisfied that the court should grant the directions sought, it is unnecessary to give further consideration to the questions of conflict of interest or replacement of the petitioner as trustee. The court was keen to obtain an independent check that the picture painted by the petitioner was both complete and accurate. It flagged up two possible ways in which its reservations might be addressed, and ultimately it was content that there be the remit to the reporter. The report has allayed the court's concerns. There is no need to revisit the issues of conflict of interest or replacement of the trustee.

Disposal

[51] We shall approve the report, and pronounce an order granting the directions sought in paragraphs 3(1), 3(2)(a), 3(2)(b), 3(2)(c), 3(2)(d), 3(2)(e), 3(2)(f), 3(3) and 5 of the prayer of the petition.