File Ref.: L/M(1) to EDB(SA)/F&A/65/24/1 (pt.5)

LEGISLATIVE COUNCIL BRIEF

Education Ordinance
(Chapter 279)

Grant Schools Provident Fund Rules
(Chapter 279, Subsidiary Legislation C)

Subsidized Schools Provident Fund Rules
(Chapter 279, Subsidiary Legislation D)

EDUCATION (AMENDMENT) BILL 2013

INTRODUCTION

At the meeting of the Executive Council on 19 March 2013, the Council ADVISED and the Acting Chief Executive ORDERED that the Education (Amendment) Bill 2013 (the Bill), at Annex, should be introduced into the Legislative Council (LegCo). The purpose of the Bill is to amend the Education Ordinance (Cap. 279) (EO) and its subsidiary legislation (i.e. the Grant Schools Provident Fund (GSPF) Rules (Cap. 279 sub. leg. C) and Subsidized Schools Provident Fund (SSPF) Rules (Cap. 279 sub. leg. D)) to provide protection to GSPF and SSPF contributors of their benefits[1] in the GSPF and SSPF in case of bankruptcy.

Annex

JUSTIFICATIONS

2. In a bankruptcy case concerning a subsidized school teacher (Re. Ng Shiu Fan [2008] 4 HKLRD 813), the Court of First Instance (CFI) ruled that section 85(3) of the EO[2] did not prevent the bankrupt's benefits under the SSPF from vesting in the trustee-in-bankruptcy (TIB) by virtue

---

[1] Subject to conditions stipulated under GSPF and SSPF Rules, "benefits" normally compose of a teacher's contributions, Government donations (in the case of grant or subsidized schools) or school's donations (in the case of direct subsidy scheme schools) and the dividends declared on the contributions/ donations.

[2] Section 85(3) of the EO stipulates that *"Subject to any rules made under subsection (1), no contribution or donation to or dividend or interest on a dividend from a provident fund shall be assignable or transferable or liable to be attached, sequestered or levied upon, for or in respect of any debt or claim whatsoever."*

of section 58(1) of the Bankruptcy Ordinance (Cap. 6) (BO)[3]. The judge further recommended that serious consideration be given to amending the law to extend the protection to retirement benefits generally in the event of bankruptcy. On appeal, the case was heard in the Court of Appeal (CA) in 2009 ([2009] 4 HKLRD 774) and the CA also agreed with the CFI's decision on the legislative effect of section 85(3), but applied the common law rule in Ex parte James and ruled that the bankrupt is entitled to the proportion of the benefits attributable to his service and contributions after his discharge from bankruptcy. On 13 April 2010, on Ng's application, leave was granted to him to appeal against the judgment of the CA. However, the status of the court case is unclear[4].

3. Noting that the retirement benefits of teachers in government schools under the Pensions Ordinance (Cap. 89) or Pension Benefits Ordinance (Cap. 99) and that of the major workforce under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (MPFSO)[5] are under protection in the event of bankruptcy, the Education Bureau (EDB) has reviewed the relevant provisions under GSPF and SSPF and considers that legislative amendment is necessary to effect similar protection to the benefits of GSPF and SSPF contributors in the event of bankruptcy, notwithstanding there is possible appeal in Ng's case.

4. Similar to Mandatory Provident Fund registered schemes, the GSPF and SSPF are statutory provident funds aiming to assist salaried people (and in the present case, aided school teachers) to accumulate retirement savings. The objective of the amendments is to protect the benefits of members in the GSPF and SSPF, such that, among others, in the event of bankruptcy of a GSPF/SSPF contributor, the right or

---

3 When Ng was adjudicated bankrupt in 1998, the applicable section 58(1) of the BO read: "*Until a trustee is appointed the Official Receiver shall be the trustee for the purposes of this Ordinance, and immediately on a debtor being adjudged bankrupt the property of the bankrupt shall vest in the trustee.*" Section 58(1) was amended in 2005 which now reads: "*On the making of a bankruptcy order, the property of the bankrupt shall vest in the Official Receiver.*"

4 Ng's two applications to the Director of Legal Aid (DLA) for legal aid were refused on 16 August 2010 and 11 January 2011 respectively. Towards the end of August 2012, the Official Receiver's Office (ORO) informed the Education Bureau (EDB) that the DLA had granted legal aid to Ng to appeal against the judgment of the CA. To date, there is still possible appeal in Ng's case.

5 Section 16 of the MPFSO has been amended (on account of the same court case) to put beyond doubt that the right or entitlement of a scheme member to any accrued benefits in a registered Mandatory Provident Fund Scheme derived from mandatory contributions is excluded from the member's property for the purposes of the BO, hence the accrued benefits in the Scheme do not vest in a TIB in case of bankruptcy of the scheme member. The Mandatory Provident Fund Schemes (Amendment) Ordinance 2011 came into operation on 13 May 2011.

entitlement of the contributor to any benefits in the GSPF and SSPF would not be made available to the creditors and that the contributor will have the benefits preserved for retirement. The intended scope of protection under the EO is consistent with that provided under the MPFSO.

OTHER OPTIONS

5. Legal advice confirms that there is no alternative to amending section 85 of the EO and related provisions in the subsidiary legislation to achieve the purpose with certainty.

THE BILL

6. The Bill seeks to add two new subsections to section 85 of the EO, namely sections 85(4) and 85(5). The proposed section 85(4) provides that if a provident fund member is an undischarged bankrupt, the right or entitlement of the member to any benefits in the GSPF and SSPF is excluded from the property of the member for the purposes of the BO. Section 85(5) spells out the cut-off date so that the protection is only applicable to a bankruptcy that is adjudicated on or after the new legislation comes into operation.

7. Furthermore, paragraphs (2A) and (2B) are added after rule 14(2)[6] of GSPF Rules and SSPF Rules to the effect that, in relation to a bankruptcy that is adjudicated on or after the new rule 14(2A) comes into operation, in working out the period of 3 years for rule 14(2), any time when the contributor is an undischarged bankrupt must be disregarded, so that the bankrupt teacher whose account has been closed can opt to withdraw the benefits after he/she is discharged from bankruptcy.

LEGISLATIVE TIMETABLE

8. The legislative timetable is as follows -

Publication in the Gazette	22 March 2013
First Reading and Commencement of Second Reading Debate	27 March 2013

[6] Under rule 14(2) of GSPF Rules and SSPF Rules respectively, if no lawful claim for the provident fund benefits is made within 3 years after the date on which a contributor's account is closed, the amount standing to the credit of the account is to be transferred to the credit of the reserve fund.

Resumption of Second Reading Debate, Committee Stage and Third Reading	to be notified

IMPLICATIONS OF THE PROPOSAL

9. The legislative proposal is in conformity with the Basic Law, including the provisions concerning human rights. The Bill will not affect the current binding effect of the EO and its subsidiary legislation. The Bill itself has no financial, civil service, economic, productivity, environmental and sustainability implications. From the social and family perspectives, the Bill will preserve the retirement benefits which will be beneficial to the bankrupt teacher and his/her family.

PUBLIC CONSULTATION

10. We consulted the Boards of Control of GSPF and SSPF[7] in the meetings on 1 November 2012 and 30 October 2012 respectively and the two Boards indicated their support to the proposal. We also briefed the LegCo Panel on Education on the legislative proposal on 11 December 2012 and Members of the Panel also expressed their support.

PUBLICITY

11. The Bill will be gazetted on 22 March 2013. A press release will be issued. A spokesman will be available to answer media and public enquiries.

BACKGROUND

(a) Legislative Intent

12. The GSPF and SSPF are statutory provident funds established to provide, subject to the provisions of the GSPF Rules and the SSPF Rules, for payments to contributors upon the cessation of their employment as teachers in grant/subsidized schools or direct subsidy scheme schools, or to their estates in case of death. Section 85(3) of the EO was originally enacted in 1952 and the EDB does not have information indicating the legislative intent of section 85(3) when it was enacted.

---

[7] The Boards of Control of GSPF and SSPF are statutory boards established under the GSPF and SSPF Rules. The GSPF and SSPF are controlled by the respective Boards of Control which members consist of Government officials and contributors nominated/appointed by designated groups of schools/Schools Councils, as well as contributors elected from representatives of teachers of designated groups of schools in the case of the SSPF and a Chairman nominated by the Grant Schools Council in the case of the GSPF.

(b) Current Practice in case of Bankruptcy

13. Before the CA's judgment in Re. Ng Shiu Fan, the EDB had released GSPF and SSPF benefits of a bankrupt (or former bankrupt) teacher to the TIB as required by the TIB when the benefits were payable to the teacher-contributor. Since the CA's judgment, payments of benefits attributable to post-discharge service and contributions/donations are paid to the contributors and the pre-discharge benefits are paid to the TIB.

ENQUIRIES

14. Enquiries in relation to this LegCo Brief should be directed to Mrs Michelle WONG, Deputy Secretary for Education, at 3509 8514.

Education Bureau
20 March 2013

A BILL

To

Amend the Education Ordinance and its subsidiary legislation to provide for protection to provident fund members, in case of bankruptcy, of their benefits in provident funds that are maintained under the Ordinance.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title

This Ordinance may be cited as the Education (Amendment) Ordinance 2013.

2. Enactments amended

The enactments specified in Parts 2 and 3 are amended as set out in those Parts.

Part 2

Amendment to Education Ordinance (Cap. 279)

3. Section 85 amended (rules for provident funds)

After section 85(3)—

Add

"(4) If a provident fund member is an undischarged bankrupt, the right or entitlement of the member to any benefits in the fund (whether accrued, accruing or to be accrued) is excluded from the property of the member for the purposes of the Bankruptcy Ordinance (Cap. 6).

(5) Subsection (4) does not apply in relation to a provident fund member's bankruptcy that is adjudicated before that subsection comes into operation.".

Part 3

Amendments to Subsidiary Legislation

Division 1—Amendment to Grant Schools Provident Fund Rules (Cap. 279 sub. leg. C)

4. Rule 14 amended (payments out and pro rata of dividends)

After rule 14(2)—

Add

"(2A) In working out the period of 3 years for paragraph (2), any time when the contributor is an undischarged bankrupt must be disregarded.

(2B) Paragraph (2A) does not apply in relation to a contributor's bankruptcy that is adjudicated before that paragraph comes into operation.".

Division 2—Amendment to Subsidized Schools Provident Fund Rules (Cap. 279 sub. leg. D)

5. Rule 14 amended (payments out and pro rata of dividends)

After rule 14(2)—

Add

"(2A) In working out the period of 3 years for paragraph (2), any time when the contributor is an undischarged bankrupt must be disregarded.

(2B) Paragraph (2A) does not apply in relation to a contributor's bankruptcy that is adjudicated before that paragraph comes into operation.".

Explanatory Memorandum

This Bill adds new section 85(4) and (5) to the Education Ordinance (Cap. 279) so that if a provident fund member is an undischarged bankrupt of a bankruptcy adjudicated on or after the new section 85(4) comes into operation, the member's right or entitlement to any benefits in the fund is excluded from his or her property for the purposes of the Bankruptcy Ordinance (Cap. 6).

2. Under rule 14(2) of the Grant Schools Provident Fund Rules (Cap. 279 sub. leg. C) and of the Subsidized Schools Provident Fund Rules (Cap. 279 sub. leg. D), if no lawful claim for the provident fund benefits is made within 3 years after the date on which a contributor's account is closed, the amount standing to the credit of the account is to be transferred to the credit of the reserve fund. The Bill adds new rule 14(2A) and (2B) to those 2 Rules, so that in relation to a bankruptcy adjudicated on or after the new rule 14(2A) comes into operation, in working out the period of 3 years for rule 14(2) of those 2 Rules, any time when the contributor is an undischarged bankrupt must be disregarded.