



Pension Schemes Bill -
can you control and overcome
risks?
Raquel Agnello QC

The extended powers

- Criminal offences of avoidance of employer debt and also conduct risking accrued scheme benefits and failure to pay CN amount due
- Extending CNs
- Requiring a statement of intent?
- Extending civil penalties
- Other changes – interview s 72A

Understanding the new criminal sanctions

- Avoidance of employer debt – based on original section 38 – main purpose or one of main purposes, to prevent the recovery of.....
- Note – no need to be connected/associated
- The intention element here – key
- Need to be a party to the act/failure to act – remember knowingly assists is also a party
- Reasonable defence – not reasonable to act as did

Second main criminal sanction

- Risking accrued scheme benefits – person does an act or engages in a course of conduct that detrimentally affects in a material way the likelihood of accrued scheme benefits being received- the material detriment test
- -party to an act/deliberate failure to act – person must have known or ought to have known that act/failure would have that effect and it was not reasonable for person to act as did
- No connected and associated test – but need party to act
- Reasonable defence as before

Key factors to retain

- tPR has to establish the intent at the criminal standard – beyond reasonable doubt
- tPR must establish at that standard the act or course of conduct which had the requisite effect – ie prevented the recovery of or materially detrimental to likelihood of scheme benefits being recovered
- Knowledge – that act/course of conduct would have that effect
- No reasonable excuse – let out for professionals ?

A deterrent or more ?

- Will be cases which can be caught, but the burden of proof –high
- Likely that more use will be made of the new civil sanctions – the act must have the effect sought in the criminal sanctions
- reduce risk analysis cases

Civil sanctions

- Similar to criminal – note burden of proof usual standard
- Also no need for connected/associated but need to be a party to the act
- The knowledge element exists here as well and the reasonable to act in way you did – exemptions IPs
- tPR has choice whether to pursue civil or criminal – civil likely to be more used

Managing the risks

- Consider carefully your position as well as that of your client
- Consider at every stage what are the consequences of the planned action of client
- Keep good records !!!!
- Majority of case will not fall into criminal – main risk is civil sanctions

Extended CN - employer insolvency test

- More like a TUV – extensive reliance on valuation
- Comparison – looking for material reduction in the amount of debt likely to be recovered by the scheme
- tPR – estimate value of assets immediately after act/failure and also amount of sec 75- using s 75(4) determination/calculation – Reg 5 Employer Debt Regs 2005
- Defences as before – mitigation, taken all steps

Employer Resources test

- Act/failure reduced the value of resources of employer and reduction was a material reduction relative to estimated s75 debt
- Regulations will set out what constitutes determination of resources of employer, as will calculation and verification – warning about the insufficiently resourced test – still hard to use !
- Defences as before !

Managing risks- extended CN

- Valuation will be essential – a real calculation exercise here now – objective
- Need to be careful about when and how can challenge the valuations of tPR – this will be essential
- Easier to assess risk in many respects
- need to be careful not falling into civil sanctions

New onerous and far reaching obligations

- Statement of intent – treat as a defence document , or will it be used as a potential liability ?
- The new notice requirements – ‘material change’
- Widening those who need to notify – connected and associated – but at what time ? Extremely wide !
- New financial penalties – great care in the notification requirements

Raquel Agnello QC



Raquel Agnello QC is a sought-after specialist in insolvency, company and commercial litigation.

She is a highly-regarded expert in the area of pensions and insolvency, in particular the 'moral hazard' provisions. She has led on many high profile cases on behalf of the Pensions Regulator, including on Nortel and Lehman in the Supreme Court. She was retained to advise the company and supervisors on the New Look company voluntary arrangement. She advises corporate groups in relation to proposed restructurings and pension issues, including risk assessment. Recent cases include advising on the Johnston Press restructuring and Cobham PLC.

Since 2001, she has sat as a Deputy Insolvency and Companies Court Judge (formerly Registrars) hearing both corporate and insolvency matters.

In 2015 she was named Legal 500's Insolvency Silk of the Year. In October 2012 and October 2016, she was named 'Barrister of the Year' at the TRI Insolvency and Rescue Awards. In January 2012, she was selected as one of the 'Hot 100' by 'The Lawyer'.

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