

# GMP Equalisation

Raquel Agnello QC  
25/04/2018

# What should trustees do about GMP equalisation ?

---

- What can trustees do when faced with problems such as equalisation or similar issues ( revaluation issues ) at a time when the scheme is in wind up and in many instances where costs involved in equalisation exercise are disproportionate ?
- Whether effectively trustees can have grounds to 'breach their duty' and deal with equalisation in other ways to the benefit overall of the scheme even if certain members may be potentially prejudiced

# Current dilemmas facing trustees

---

- Whilst scheme is up and running – do you need to carry out an equalisation exercise ? If so what do you do/what basis ?
- Once in wind up ? Solvent - insolvent ?
- Difficult to see how can avoid once in wind up
- Whatever outcome of Lloyds, trustees have little justification for not grappling with equalisation during wind up

# Current market practice ( or some of it )

---

- Winding up – policy requires a degree of equalisation to be carried out
- Insurer provides the mechanism for the ‘low key/level equalisation’ exercise and also provides the run off indemnity insurance necessary for trustees

# Difficulties

---

- Run off insurance for a limited time – 12 years – after that you as Trustee are on your own - no insurance for the period when you as Trustee may most need it when claims may well turn up based on the equalisation carried out
- Doesn't resolve issue as to whether the Trustees have a duty to carry out exercise
- In certain cases, buy out insurance policy excludes any claim relating to equalisation – Trustees left to shoulder going forward – how much of an exercise needs to be carried out ?

# Ideas ?

---

- Is there a possible solution allowing Trustees to obtain some measure of protection ( will always be a risk – about reducing/managing risk – not eliminating ) by carrying out a ‘rough and ready’ or de minimis equalisation exercise ?
- Or a breach of duty ?

# Insolvency world - potential solution ?

---

- Example – the pyramid/the Ponzi fraud
- People invested, returns paid out using new investors payments
- Winding up – insufficient assets to pay out all claims
- The exercise of discovering whether particular beneficiaries can trace part or all of their claims – is the liquidator obliged to do this ?

# Once collected in the assets....

---

- How does the liquidator determine how to distribute ?
- Generally – insolvent estates – administered by the liquidator – realise assets and distribute – pari passu to unsecured creditors
- Secured creditors –rely on security with any unsecured balance being provable in the liquidation
- But what about proprietary claims ?

# Liquidator or trustee ?

---

- Liquidator frequently acts as trustee in cases where potential proprietary claims
- Specific case law dealing with his costs – Re Berkley Applegate ( Beddoes type order )
- But what is duty on liquidator acting as trustee and how to deal with proprietary or hybrid claims ?

# Insolvency practice

---

- Liquidator seeks directions from court enabling him to treat all creditors in the same way and distribute on basis of pari passu
- Costs of carrying out exercise of trying to ascertain those with traceable proprietary claims likely to be disproportionate and with no certainty of the number and quantum of those with valid proprietary claims
- In the meantime the assets are disappearing into costs

# Court application

---

- In many of these cases, the Court is aware that this type of direction may well prejudice those with potentially valid proprietary claims, but that the costs of carrying out the exercise are disproportionate and uncertain
- Directions given before final determination to enable creditors/proprietary claimants to make representations ( 'the rep ben' )

# Applicable to certain equalisation claims ?

---

- The jurisdiction for the Insolvency Courts to give the directions – based on equity
- Liquidator is acting as a trustee of the assets subject to the proprietary claims
- Opportunity is given for representations to be made
- Sometimes a sample attempt at tracing is carried out

# The pensions type submission

---

- Pension scheme – wind up – limited assets – insolvent
- Obtained some estimates of costs of carrying out different equalisation exercises
- Tried to work out how many could potentially benefit from this exercise
- Have also obtained a quote for a more base line 'rough and ready' equalisation exercise

# In the pensions context

---

- So can present to the Court a rough idea of the costs of the more detailed exercise, its uncertainty in outcome and its effect in depletion of pension scheme assets
- Propose with sanction of the court – to carry out a rough and ready exercise, then wind up
- Trustees – a court order sanctioning action

# Thoughts

---

- Would such an approach provide a better management of risk for a trustee ?
- Will be fact specific – not appropriate for all cases
- Solvent scheme – less likely to be an issue save in cases where the cost of the exercise or exercises is so large that risk of reducing overall the benefits to be received
- Applicable to other areas of uncertainty ?

# Raquel Agnello QC

---



Raquel 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.

Raquel is fluent in French and Portuguese.

Call : 020 7242 5532

E-mail: [ragnello@erskinechambers.com](mailto:ragnello@erskinechambers.com)

[www.erskinechambers.com/barrister/raquel-agnello-qc/](http://www.erskinechambers.com/barrister/raquel-agnello-qc/)