



# Distressed employers and schemes- CVA's and RAAs



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# What is happening in the pensions/insolvency market ?

- CVAs – hot topic – retail industry pushing the boundaries – PPF approach part of current challenge ?
- RAAs – still few but a useful tool- too rigid an approach by tPR ?
- Pre-pack administration – still the more traditional way to deal with distressed employers – *Johnston Press*

# CVAs

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- An out of court procedure – little recent case law
- All unsecured creditors to be treated equally
- Growth of CVAs treating different classes of creditors in different ways – landlords, but at the same time paying in full other unsecured creditors
- Waiting for the litigation bubble challenge to hit !

# CVAs - Mothercare

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- £139.9 m total deficit – 3 schemes – Mothercare, Children’s World, and ELC
- PPF required assurances -
  - £4.6m accelerated payment of existing deficit contributions
  - Further £5m of deficit contributions over next 2 ½ years to be distributed at Trustees’ discretion

# PPF statement – Malcolm Weir

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- *'We welcome that the company was prepared to listen and take on board our view that the CVA proposals should not be to the detriment of the pensions schemes.'*
- *'Having received additional suitable assurances about the position of the pension schemes, we were able to support the CVA proposals which will see the company continue to take full responsibility for the pension schemes going forward. The PPF will always act robustly in any CVA in the interests of all pension scheme members and our levy-payers.'*

# PPF – a super creditor ?

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- Section 75 debt – unsecured debt – contingent at the time of the proposed CVA
- So the negotiations and demands of the PPF – are they in some way a ‘preferential’ creditor ?
- Normally a significant creditor and need their vote to obtain approval – *Debenhams*
- Possible challenge to what it seeks ? *Regis* – major challenge on landlord approach

# RAAs-

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- *'RAAs are extremely uncommon; the expectation when they were introduced into legislation was that they would be used rarely, which has proved to be the case'* ( August 2010 )
- tPR must consider arrangement reasonable – treated like a clearance type application – not a reserved regulatory power – PPF – no objection
- Section 89 statements – no judicial decision or scrutiny !

# RAAs

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- Trustees believe a reasonable likelihood of entering PPF assessment period in next 12 months – inevitably insolvent !
- PPF commercially ask for – cash upfront equal or better to the insolvency outcome for the scheme and 33% equity stake in company ( Newco )
- Generally, secured creditors take a ‘hit’ on equity dilution – are they prepared to do this ?

## RAAs- circumstances considered by tPR

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- Whether a better outcome might otherwise be attained for the scheme by other means ( including through the use of tPR's powers where relevant )
- Outcome of proposals in relation to other creditors
- Position of rest of employer group

# Observations

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- CVAs – trend to seek and obtain better terms than other unsecured creditors despite what rules say
- RAAs – rigidity in requirement for equity stake – again seeking a better position than other creditors even where no moral hazard action likely to succeed
- Secured creditors – may turn to pre pack as better return to them ?

# Raquel Agnello QC

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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. She acts in ground breaking bankruptcy cases such as Re Moore, listed before a specially constituted Divisional 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. She acted for the bondholders in Johnston Press restructuring.

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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