

**TPR POWERS  
LESSONS FROM BHS, BRITISH STEEL  
AND PENSION LIBERATION**

**Paul Newman QC  
Wilberforce Chambers**

# INTRODUCTION

House of Commons Work and Pensions Select Committee Reports

- BHS (July 2016)
- Defined Benefit Pension Schemes (December 2016)

Government Green Paper: *Security and Sustainability in Defined Benefit Pension Schemes* (February 2017)

Pinsent Masons, the Pensions Institute and Pendragon: *Pensions and Chocolate* (February 2017)

*“If everybody loves you, something is wrong. Find at least one enemy to keep you alert”*

Paul Coelho, Brazilian author

# SCHEME FUNDING

“One size fits all” MFR approach v scheme specific funding approach

Explicit legislative funding requirements

Power to set binding standards

- Constrained by the flexibility inherent in the concept of “prudence”
- More effective enforcement mechanism

# SCHEME FUNDING

## Distressed schemes

- Enhanced winding-up power: s.11 Pensions Act 1995
- Enhanced regulatory apportionment arrangement regime
- More intensive regulatory support

# CORPORATE RESTRUCTURING

Striking the right balance

- The notifiable events regime
- Voluntary clearance application process
- Retrospective regulatory investigation

# CORPORATE RESTRUCTURING

## Select Committee's recommendations

- Advance clearance requirement *to prevent a disproportionately adverse impact on normal economic activity.*
- The “nuclear deterrent”: punitive fines for engaging in anti-avoidance activity

## Summary of Green Paper response to advance clearance ([314]-[315])

*Making clearance a compulsory procedure even in very limited circumstances has the potential to make turnarounds more difficult and lead to more businesses being placed into insolvency.*

*Giving the Regulator this power could also reduce the attractiveness of UK companies with DB pension schemes to investors, especially if investors believe this could restrict the ability of these companies to speedily restructure their operations should they fall into difficulty in the future.*

# CORPORATE RESTRUCTURING

## Green Paper response to punitive fines

- May drive employers to seek unnecessary clearance
- Could overwhelm Regulator with applications or delay corporate activity
- Criteria need to be clear and limited
- Narrow time limits for Regulator to act

# CORPORATE RESTRUCTURING

A need or desire for reform?

- Outcome of BHS investigation: £363m for the scheme
- Costs of reform
- Need for primary legislation

# PENSION LIBERATION

ss.18-21 Pensions Act 2004

Not fit for purpose: *ibid* s.18(2)

*Money is to be taken to have been liberated from a pension scheme if-*

*(a) the money directly or indirectly represents an amount that, in respect of accrued rights of a member of a pension scheme, has been transferred out of the scheme in pursuance of-*

*(i) a relevant statutory provision, or*

*(ii) a provision of the applicable rules, other than a relevant statutory provision,*

*(b) the trustees or managers of the scheme transferred the amount out of the scheme on the basis that a third party ("the liberator") would secure that the amount was used in an authorised way,*

*(c) the amount has not been used in an authorised way [i.e. authorised by the legislation or the applicable rules], and*

*(d) the liberator has not secured, and is not likely to secure, that the amount will be used in an authorised way.*

# PENSION LIBERATION

## Regulator's use of the independent trustee

- *Dalriada Trustees Ltd v Faulds [2012] 2 All ER 734*
- *Dalriada Trustees Ltd v Woodward [2012] WTLR 1489*
- *The Pensions Regulator v Dalriada Trustees Ltd [2013] EWHC 4346 (Ch)*

## Direct action by the Regulator

- ss.15 and 16 Pensions Act 2004
- *Re LPA Umbrella Trust [2014] EWHC 1378 (Ch).*

# PENSION LIBERATION

Power to intervene in the transfer of pension benefits to suspected liberation vehicles

- *Hughes v Royal London Mutual Insurance Society Ltd*  
*[2016] Pens LR 69*

# CONCLUSION

*“Change? Change? Aren't things bad enough as they are?”*

Lord Salisbury, 19th century Prime Minister.

Green Paper at [293]

*Increasing the powers of the Regulator is not something that should be undertaken lightly – it is important that any powers are proportionate to the issues at hand, and that clear principles are applied in assessing what those powers should be.*

tPR's response to Select Committee

*We are proactively engaging with schemes earlier to prevent problems arising, and to ensure that sponsoring employers and pension trustees understand our expectations of acceptable funding plans. We are pursuing more cases and being bolder in the use of our powers, including testing powers we have made less use of in the past.*

**Thank you**

**pnewman@wilberforce.co.uk**