

How is quantum and reasonableness constraining the power of the Pensions Regulator to impose contribution notices and financial support directions?

Raquel Agnello QC

A good question

- Very few cases since introduction of provisions
- The amendments – Pensions Act 2008 not made any difference
- Can we blame just these two factors ?
- Too simplistic

Other possibilities

- Lots of cases settle?
- Corporate entities and directors generally behave impeccably towards schemes?
- Provisions not fit for purpose ?
- Potential targets are good at preventing Regulator from bringing cases to fruition due to stunning defence and tactical work ?
- 'Regulator too slow'?

The moral hazard provisions

- Very wide – restraints are reasonableness and quantum
- Checks and balances regime
- Price you pay for wide provisions
- Difficult for potential targets to assess risk
- Quantum – a real movable feast

Role of reasonableness in FSDs and CNs

- All encompassing, timeless provisions
- Compare to employer test – FSD – 2 years
- Compare connected/associated test – 2 or 6 years
- Act/failure to act – 6 years
- Reasonableness factors not limited but needs to be relevant

Effect of this type of provision?

- Regulator deliberately constrained from issuing CNs and FSDs
- Fact intensive exercise
- Not a tick box exercise !
- Use of section 72 – no excuse not to obtain detailed background
- Expensive process for potential targets

Financial Circumstances

- One of reasonableness factors
- Lack of means? Not necessarily prevent CN – *Carrington Wire*
- Insolvent ? No – *Sea Containers, Lehman*
- What if payment of CN/ financial support tip into insolvency ?
- Interrelation between this factor and quantum ?

Quantum – FSDs and s 47 CNs - 1

- FSDs - not quantum based
- Stage 2 – financial support – reasonable in circumstances – section 45(3)
- Judge by section 43(7) factors – if relevant
- flexibility of arrangement – no guidance
- Section 47 (3) – specific sum

Quantum – FSDs and s 47 CNs - 2

- Reasonableness factors – s 47(4)
- Whole or part of shortfall sum
- Each target – maximum s 75 – *Storm Funding*
- Joint and several liability

Quantum – CNs –s 38 - 1

- Must stipulate quantum
- Whole or part shortfall sum
- Same *Storm* point and joint and several liability
- How Regulator operate? Reasonableness factors in s38 (7)
- Fact intensive

Quantum – CNs –s 38 - 2

- Additional reasonableness factors added by Pensions Act 2008
- New 'value of benefits' factor –s38(7)(ea)
- Is quantum linked to benefits?
- *Carrington* – easy – guarantee taken away

THE REPLY

- Provisions require fact intensive exercise
- Uncertainty as to how to calculate quantum
- Consequence of the checks and balances
- Provisions fit for purpose ?

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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.

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