The Pensions Regulator: cases and powers

Rosalind Connor

Partner, Jones Day

Regulator cases and powers

- Regulator's use of its powers depends on
  - Clarity of wording
  - Former use
- Consider:
  - Removal and change of trustees
  - Financial support directions
  - Contribution notices

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Change of trustees

- Prohibition orders (against trustee for one scheme or all)
  - s3 PA95
  - Notice requirement under s5 repealed by PA04
- Appointment orders under s7 PA95
- Telent trustees
  - Arranged in 24 hours
- Powers used regularly

Financial support directions

- May be issued if scheme employer is:
  - Insufficiently resourced; or
  - A service company
- Test is relatively clear, but Regulator must be “reasonable”
- Sea Containers
  - Service company argument
  - Appealed to DP and then PRT
  - Appeal was dropped on striking of deal
  - Delaware bankruptcy court approved deal

FSDs – Nortel & Lehmans

- UK companies insolvent
  - Insufficiently resourced
- Nortel issued against overseas companies only
  - US and Canadian courts refused to enforce
  - In US, held that participation by trustees in the Regulator’s process was in breach of the Chapter 11 stay
- Lehmans also issued against UK companies
- Application to court on priority status
  - “Super priority” as administration expense
  - Under appeal

Contribution notices

- May only be issued if party has taken part in an act or omission where:
  - a main purpose was to reduce s75 debt or chance of it being paid in full (since 27/4/04)
  - It has had a materially detrimental effect on the s75 debt being paid in full (since 29/6/09)
- Difficult to interpret?
- Often threatened
  - Marconi – £490m escrow
  - Duke Street - £8m payment
- Only issued once - Bonas

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The Bonas Case

- Bonas Machine Company Limited
  - put into administration, where its assets were bought by:
- Michel van der Wiele NV
  - its parent, through a "pre-pack" administration
  - which is just an administration where the sale is agreed in advance, to limit the damage of time in admin
- The Bonas Group Pension Scheme
  - was left behind for the PPF
- Clearance was not sought

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They didn’t take it lying down

- Appealed to the Determinations Panel
  - Upheld, but struck down a claim against Mr Beauduin, a director
- Appealed to the Upper Tribunal
  - Application to strike out the determination (“barring order”)
- First consideration of Regulator’s actions by the court
  - Mr Justice Warren was not impressed
  - Barring order only granted in relation to further action against Mr Beauduin
- Case settled for £60,000
  - Did the Regulator want to avoid a hearing?

What the courts thought…

- Clearance wasn't sought
  - Regulator generally does not like this – and demands "mitigation" for clearance
  - Argued that because of "mitigation" policy, the act of not seeking clearance means that the scheme is less well funded
  - Court said – can't use "mitigation" in assessment
  - If scheme is no worse off because of the pre-pack (and insolvency is assured), no loss, so no case
- MvdW didn't provide finance to support Bonas' pension contributions
  - Regulator treats this as an "act or failure to act"
  - Court says – MvdW has no obligation to fund Bonas, so cannot be criticised simply for failing to pour cash into a money pit

What does this mean?

- Regulator processes for clearance (and CNs) have developed in a legal vacuum
- Will the Regulator want to repeat this situation?
- If not, no attack/need for clearance
  - if return to scheme is:
    - minimal on insolvency; or
    - at least as good on restructure
  - if parent is simply refusing support
- Does this mean "mitigation" will disappear?
- Can the Regulator attack Silentnight/Visit London?

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