1 The words “material detriment” have a specific legal meaning in the moral hazard provision of the Pensions Act 2004. The employer and a person connected or associated with it can be made personally liable for all or part of the pension debt (para 5(b) below) under a contribution notice (CN) made by the Pensions Regulator (TPR) under s38 of that Act, if the person was party to an act or deliberate failure to act, which results in a material detriment to the scheme.

2 The material detriment test is met if TPR is of the opinion that the act or failure has detrimentally affected in a material way the likelihood of accrued scheme benefits being received (PA 2004 s38A).

3 The PA 2004 does not mention “detriment” except with the adjective “material”, and the remainder of the pension legislation has but few mentions of “detriment”, of which the most significant are about individual workers in connection with automatic enrolments (PA 2008), individual members of the Local Government Pension Scheme with fewer than ten years to retirement in connection with the introduction of the 2014 scheme (SI 2006/349) and individual members of a DB scheme, who wish to transfer to a DC scheme in order to take advantage the flexible access to pension savings available in the latter (PA 2015).

4 This leads to the question, in relation to pension scheme funding, what, if anything, the scheme’s trustees and TPR can do about a detriment to a pension scheme that is not material. The same question can be asked also of a material detriment in respect of which TPR decides not to issue a CN.

5 There two principal sets of statutory provisions about scheme funding:

(a) scheme specific funding under Part 3 (ss 221 to 233) of the PA 2004, under which, usually every third year, the scheme is valued and a recovery plan and schedule of contributions are agreed or imposed; and

(b) s75 of the PA 1995, under which, when the scheme is being wound up (and in certain other circumstances if the scheme has more than one employer), the amount, by which the cost of securing the scheme’s liabilities by the purchase of annuity and deferred annuity contracts exceeds the value of its assets, becomes a debt payable by the employer.

6 Apart from a CN under s38 of the PA 2004, which is not a primary funding provision, the statutory provisions under which additional contributions to the scheme or an adjustment to the schedule of contributions might be made are:

(a) ib s224(5), which says that nothing in the section affects any power or duty of the trustees to obtain actuarial valuations at more frequent intervals or in other circumstances or on other occasions;

(b) ib s226(1), which requires the trustees to review and if necessary revise a recovery plan if it appears to them that the statutory funding objective was not being met at the date of the latest valuation;

(c) ib s227(1); which enable trustee to prepare, and from time to time review and if necessary revise, a schedule of contributions

(d) SI 2005/3377, reg 8(3), which requires the trustees to review and if necessary revise a recovery plan if the trustees consider that there are reasons that may justify a variation to it.

7 TPR has a duty under the PA 2004 s90(2)(d) to issue a code of practice about scheme funding. Codes issued under this section are admissible in evidence in legal proceedings and must be taken into account (PA 2004 s90(5)).

Roderick Ramage
BSc(Econ) solicitor
authorised and regulated by the Solicitors’ Regulation Authority number 231800
Copehale Coppenhall Stafford ST18 9BW www.law-office.co.uk
tel 01785-223030, fax 01785-228281, e-mail roderick.ramage@law-office.co.uk

8 The Code of practice no. 3, Funding defined benefits, issued in July 2014 contains guidance about trustees' duties between triennial valuations. Paragraphs 49 to 51 (risks) and 85 to 87 (covenant monitoring) remind trustees that material changes can occur between actuarial valuations and of the employers duty of employers to disclose information to the trustees (a) on request and (b) within one month of any event of material significance in the exercise of the trustees' functions under SI 1996/1715, reg 6. In short the Code does not add to the relevant statutory provisions listed in para 6 above.

9 What the above shows is that, in the absence of any relevant powers given to the trustees in the scheme's deeds and rules, the only power that the law gives to trustees to respond to a detriment is to seek to agree a new recovery plan and schedule of contributions or, if the employer does not agree, seek directions from TPR and the imposition of a schedule of contributions (PA 2004 s231(2)).

10 There is a likelihood that a change in the employer's business, such as the acquisition of another business, some other investment, the purchase of minority shareholders or the like, which might involve bank funding and security, will be seen by the trustees as detrimental to the scheme. The employer's preparation for such an event should include at least the following.

(a) Check the scheme's deeds and rules for any powers that the trustees have that might limit the employer's activities, require consent or trigger a winding up of the scheme.

(b) Check for similar powers any agreement made with the trustees.

(c) Instruct an accountant to prepare an assessment of the employer covenant before and after the proposed business change and advise whether there is a detriment to the scheme and if so whether it is material.

(d) Instruct an actuary (there should be no conflict if the scheme actuary is willing) to prepare a long terms cash flow projection of the scheme, which will give a more useful view of the pensions and lump sums to be paid and the contributions needed to ensure that they can be met as and when due than can be shown by the capitalised amounts in normal valuations.

(e) Take advice whether the employer has any obligation to notify the trustees or TPR under SI 1996/1715 or SI 2005/900 and whether there is a material risk of a CN under the PA 2004 s38.

(f) Consider whether to inform the trustees voluntarily of the business proposal or whether, if satisfied that there are no relevant powers under (a) and (b), no notification obligations and no material risk of a CN, to proceed without notifying them.

11 It is possible that the trustees will seek "mitigation" and might require any mitigation payment to be separate from payments under the recovery plan. Demands such as these are outside the trustees' powers (see para 6 above). Unless it suits the employer to agree to the trustees' demands, the employer's stance can be that the trustees either start a new valuation or wait for the next valuation with a view to a new recovery plan and schedule of contributions.

12 Assertions by TPR in support of steps such as mentioned in para 11 above are "mission creep", by which it seeks to impose or at least encourage a view of the law and its application that goes beyond what the law and its own guidance in the funding Code require. The most likely reasons for an employer to be cowered by the joint forces of the trustees and TPR are that the trustees' and their advisers' expenses will be taken out of the scheme (and added to the funding cost) and, in a dispute, TPR will be in its own field while the employer would rather get on with running a business and earning the wherewithal to support the scheme.

END