

In my New Year 2015 update I wrote a short technical summary about pensions in corporate finance transactions. Not all straightforward transactions are as straightforward as they ought to be. Here are a few examples of transactions, in which I have helped other solicitors as their temporary pension law department.

### **closed final salary scheme**

“We closed the final salary so many years ago that we sent the files for shredding.”

In a share sale the only surviving data about the target group's final salary schemes consisted of barely a handful of copy papers and notes to the annual audited accounts. The seller's directors could not be brought to address the pension questions until the buyer's solicitors, demanded stringent warranties and indemnities.

outcome: The target group's failure to retain documents was irremediable, so it was impossible to resist the warranties and indemnities demanded by the buyer. The detailed memory of the company's retired IFA enabled a report to be prepared for the company's directors and sellers, so they understood (or at least could not deny that they had been told) why the warranties and indemnities were unavoidable and the nature of the risks.

lesson: Ensure at the start of the sale process that the sellers and warrantors understand (a) the significance of the lack of data, (b) that even if the buyer fails to understand it, its financiers will, (c) that the lack of data should be disclosed and (d) that the seller should volunteer appropriate warranties and indemnities.

moral: A failure to dispose of this problem at the start meant that, later, the parties were distracted from the serious commercial points of the deal.

### **data room filled by the client**

The majority shareholder's own summary that the target company had, apart from a couple of SSASs for the directors, an old GPPP and a new automatic enrolment (AE) scheme was, as it turned out, accurate. However, he had selected and kept control of the papers for uploading to the data room, and the documents, names and other details pointed clearly to seven schemes, including a death in service scheme not in the summary. He denied the existence of some supposed schemes, even though it was he who had provided membership schedules with misleading and inconsistent names.

outcome: The final pension aspects of the deal were easy and straightforward, but only after a great deal of work to extract the full information and put it into a form that was compatible with the disclosures in the data room.

moral: Convince the client that holding onto control of the disclosures will not save money, but will cause aggravation and cost more in the end.

### **the proprietors' SSAS and scheme pensions**

A few months after the sale of a private company (Target), the corporate seller sent an email to its new solicitors. “Is it OK to sign the attached?” The attachment was an amendment of a pension scheme, of which seller was the only employer and the members were the directors of the Target. The scheme had been operated as a SSAS, whose main investment was property let to the Target, and had power to pay scheme

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pensions. The amendment deed, prepared by a well-known professional corporate trustee, would have transferred all the employer's powers to the trustees, while leaving it in place as the scheme employer. It took the threat of exercising the seller's powers as employer to remove the trustees and appoint new ones, admit new members and review the investments to persuade the professional trustee to produce to a new deed and then and agree revisions to it.

outcome: The parties executed a deed, by which seller was released and discharged from the scheme and the trustees (including the professional trustee) gave unqualified warranties, and the seller was satisfied that there was no material risk of scheme pensions. Secondary outcomes were (a) that the members regained control of their own scheme and (b) the legal costs were several times more than they would have been if the scheme had been separated from the seller on or before the sale.

moral: No matter how rushed the sale, the proprietors' pension scheme should be at the top of the agenda.

### **LGPS outsourcing and transfers**

This example is not one transaction but an amalgamation of several.

Local authorities may and often do agree risk sharing, eg that the LA carries the risks of changes in actuarial assumption, interest rates, investment returns etc while the contractors carry them for pay increases, redundancies and ill-health and other early retirements, but these must be negotiated in the deal and are not incorporated in the admission agreement, which merely implements the part of the deal that the transferred employees remain members of the Local Government Pension Scheme.

Before the 2007 Direction pension protection for transferring employees was provided through Fair Deal. The guidance for New Fair Deal states expressly that it applies only to central government, NHS and maintained schools pension schemes.

Pension protection is enforced against contractors and transferees by contract.

Bidders for contracts or transfers sometimes fail to seek advice about the admission agreement until after the terms have already been agreed. In one case, the chairman of a charity, who had signed a service contract, cancelled it and suffered a penalty, when she realised the pension risks on having the admission agreement explained.

Conversely, some LAs confuse Fair Deal with the 2007 Direction, fail to appreciate that pension protection is not an enforceable right except by contract with the contractor or transferee and produce the admission agreement, if at all, too late for the contractor or transferee to be obliged to execute it, with the result that former LA employees lose or are never given the pension protection that they are intended to have.

### **no automatic enrolment (AE) scheme**

The sellers disclosed (late) against the AE warranty that the target had not complied with its AE obligation. (On an assets purchase it would have been irrelevant to the buyer.) Enough data had been disclosed to determine the target's staging date and calculate the total contribution to an AE date after completion.

outcome: The sellers agreed a deduction from the price equal to the employer's and employees' unpaid contributions. The buyer enrolled the employees into the buyer's AE scheme immediately after completion, paid all the arrears of contributions from the target's staging date and reported the AE failure to the Pensions Regulator and the action taken to remedy it.

moral: Be thankful for a competent well managed client (the buyer), with staff who could understand, agree to and implement a remedy without interrupting the deal.

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