BUYING BUSINESSES OUT OF ADMINISTRATION AFTER *PROCTER & GAMBLE*

PENSIONS, TUPE & THE ASSESSMENT OF RISK

ASSET DEALS: LESS PENSIONS RISK THAN WAS THOUGHT

The recent court ruling in Procter & Gamble (P & G) brought some rare good news for buyers in asset deals. The effect of the ruling is that at least one defined benefit issue looks less material now than it was previously thought to be. We have now been looking closely at how the ruling would operate in the case of an asset deal arising in the context of an administration.

Buyers using asset purchases have for a number of years been confronted with the risk that certain retirement rights might transfer to a business buyer by operation of TUPE in relation to ordinary occupational pension schemes (commonly known as the “Beckmann risk”).

The Beckmann risk is particularly acute on distressed or pre-pack acquisitions where there is no counter-party prepared to give a meaningful indemnity or indeed any indemnity at all to cover the risk.

This risk existed despite the fact that TUPE included an exception to the normal principle that “employment-related rights transfer” relating to “benefits for old age, invalidity or survivors” under an occupational pension scheme.

In P & G, the High Court ruled that pension rights which arise in connection with early retirement and which could continue beyond normal retirement date are not “for old age”, and therefore do transfer. But this was subject to two provisos:

- to the extent that the rights were satisfied by payment of benefits under the seller’s scheme, the buyer’s corresponding obligations were deemed to have been satisfied; and
- any part of the benefit which was payable only after normal retirement date was a benefit for old age.

In other words, a buyer only has to deal with any rights attributable to the period up to normal retirement date, and only to the extent that they are not covered by benefits paid under the transferor’s scheme. This materially reduces the potential exposure of buyers - although the crucial fact remains that the actual pension assets from which the benefits would have been intended to have been paid does not normally transfer to the buyer.

P & G may or may not go to the Court of Appeal so you should be warned that this cannot be considered completely definitive yet.

ASSESSING THE BECKMANN RISK

What are the practicalities of dealing with the Beckmann risk in the case of a distressed business purchase?

In such situations time is usually of the essence if good-will, staff and customers are not to drift away overnight, so any pensions-related risk assessment will need to be undertaken very quickly.

An accurate percentage-based assessment of the likelihood of there being a problem is impossible, but based on our own experience:

- most occupational pension schemes does not provide an automatic right to enhanced benefits on early retirement, so in most cases there won’t be a Beckmann issue at all;
- most enhanced benefits in relation to early retirement are subject to fulfilment of a contingency such as trustee and/or (as in the case of P & G itself) employer consent. The buyer may be able to exercise an employer’s discretion simply to say “no”;
- in most pre-pack situations, some planning will have been done so the relevant scheme provisions can be checked quickly; and
- most early retirement benefits relate only to schemes where accrual is ongoing, and most occupational pension schemes are now closed to future accrual.

WHAT TO DO IF YOU DO HAVE A POTENTIAL PROBLEM

Can you just take normal steps to amend or terminate the problematic rights post-deal?

If the reason for a contractual change is connected with the TUPE transfer, the general principle is that the change will be void, even if employees freely agreed to it or received a buy-out payment.

However, if a business is purchased out of administration, elected employee representatives can agree changes to terms and conditions of employment which are connected with the transfer. This ought to allow elected employee representatives to agree to the removal of Beckmann rights in order to save jobs.

It is also possible that the problem can disappear altogether if the seller's pension scheme enters into winding-up before the transfer occurs. Whether or not this happens will depend on the terms of the scheme rules and, in many cases, the exercise of the scheme trustees' discretionary powers.

SO ARE BUYERS BETTER OFF AFTER P & G?

The actual financial exposure resulting from the Beckmann risk is smaller than has often been thought.

ARE THERE ANY OTHER ISSUES?

Unfortunately, there are still a few. Beckmann rights may, for example, have been inherited by the seller from previous TUPE transfers, and, if so, these would transfer on subsequent transfers.

But the broad picture is now a lot clearer, and with prompt and accurate advice deal-doers should be able to concentrate on the fundamentals for a transaction, rather than have to wade through pages of warnings about a much wider range of potential Beckmann outcomes.

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