

February 2008

Regulator Imposes First FSD

Early February saw the Pensions Regulator (the "Regulator") formally impose its first Financial Support Directions ("FSDs") almost three years after coming into existence. The FSDs were originally issued to Sea Containers Limited ("SCL") in respect of two pension schemes of its subsidiary, Sea Containers Services Limited, back in June 2007 and earlier this year SCL withdrew its appeal against them.

A press release issued on behalf of SCL said: "Sea Containers is pleased to have reached a timely and consensual agreement with the Trustees. The agreement with the Trustees of the pension funds... will allow the company and the trustees to avoid costly and protracted litigation in multiple and potentially competing jurisdictions."

The Strength of the Regulator's Powers

So now that the Regulator has finally used the powers provided to him in the 2004 Pensions Act should we be more concerned about the strength of his powers and his willingness to use them? What can we learn from the process? In truth, not as much as you might think, indeed we would suggest that since this was a unique case the Regulator was able to act in this way without setting a significant precedent for future FSDs. Further because the appeal was dropped the Regulator's powers were not tested fully.

The Principal Employer of the two schemes, Sea Containers Services Limited, is a service company of SCL and as such is deemed to be insufficiently resourced without having to consider the usual test against the buy-out deficits of the schemes. In addition to this, back in October 2006 SCL (which is registered in Bermuda) had filed for Chapter 11 bankruptcy protection. These two facts taken together create a very unique circumstance and do not provide much additional information on when and how the Regulator will use his "moral hazard" powers.

What Happens Next?

For SCL and the trustees of the schemes it is still not absolutely clear what happens next. In the first instance SCL was given 30 days to put in place financial support for the schemes and the SCL press announcement indicates that SCL has reached an agreement with the trustees which is now subject to Regulator approval. The press release also states however that the settlement is subject to Delaware Bankruptcy Court agreement so we will have to wait to see whether or not the Bankruptcy Court recognises the FSDs and indeed if it does how the schemes will rank against the other creditors of SCL. It is still not clear whether the members will be any better off as a result of the FSDs being imposed.

Summary

Although we've now seen the Regulator use one of his moral hazard powers the uniqueness of the case means that it gives little away in terms of how the Regulator will operate in the realms of FSDs and Contribution Notices ("CNs"). We consider that the formal imposition of an FSD does nothing to change the landscape in which corporate transactions currently operate.

As the process stands, the Regulator uses the mere threat of his powers and the existence of the clearance process to encourage companies to act in appropriate manner in commercial situations ensuring that the covenant afforded to schemes is not weakened materially due to corporate transactions. This has worked effectively for him to date and we do not envisage a rush on the issue of FSDs or CNs.

If you would like further information on this topic or have a specific query please contact or [Richard Jones](#) (020) 7533 6967 or [Lesley-Anne Cameron](#) (020) 7533 6966.

Email info@pstransactions.co.uk or visit our website at www.pstransactions.co.uk