

Institute and Faculty of Actuaries  
5 October 2010

## Insolvency Insight – Securing Scheme Liabilities on Employer Insolvency

**Jeremy Benson**



# Introduction

- Fixed Charge over Employer's Assets
- Guarantee – Parent Company
- Guarantee – Bank
- Negative Pledge
- Pension Funding Partnership

# Fixed Charge/Legal Mortgage over Employer's Assets – Introduction

- Fixed Charge:
  - Charge over shares;
  - Charge over cash;
  - Charge over Real Estate “Legal Mortgage” (England/Wales); “Standard Security” (Scotland); “Mortgage”/“Charge” (Northern Ireland)
- The anatomy of a fixed charge
- Issues for Trustees and Employer and possible solutions
- Case study – PPF Contingent Asset Agreement Type B(ii)EW

# The Anatomy of a Fixed Charge

## ■ Identifying the charged assets

- What is being charged?
- Ancillary rights (i.e. rental income and insurance proceeds)
- The necessity of control – *National Westminster Bank plc vs Spectrum Plus Limited*

## ■ Identifying the “Secured Liabilities”

- Covenant to pay and realisations on enforcement
- “All sums due”
- Specific sums/liabilities
- Liabilities under pensions legislation

# The Anatomy of a Fixed Charge cont.

## ■ Events of Default and Enforcement

- Failure to discharge Secured Liabilities when due
- Insolvency
- Breach of representation/warranty
- Breach of covenant in mortgage

## ■ Realising the asset

- Power of Sale – statutory (section 101 of the Law of Property Act 1925) and contractual extension
- Appointment of fixed charge/LPA receiver
- Impact of moratorium in Administration
- Other issues affecting liquidity and valuation

# The Anatomy of a Fixed Charge cont.

## ■ Representations and Warranties

## ■ Covenants

- Negative pledge
- Compliance with laws and regulations
- Preserving Asset Value
- Real Estate – insurance/leases, licences and proprietary interests/environmental liabilities

# Fixed Charge/Legal Mortgage over Employer's Assets – Issues for Trustees and Employer and possible solutions

## ■ Discharging the charge in whole

- “Equity of Redemption”
- Limiting the lifetime of the charge – risks

## ■ Releasing assets from the charge and other dealings

- Negative pledge and restrictions on leases
- Release and substitution criteria
- Deemed consent

# Fixed Charge/Legal Mortgage over Employer's Assets – Issues for Trustees and Employer and possible solutions cont.

## ■ Competing security

- Negative pledge/covenants in bank security
- Deeds of priority and subordination
- Overreaching by prior mortgagee

## ■ Consents required under legal mortgage and on-going management role



# Fixed Charge/Legal Mortgage over Employer's Assets – PPF Contingent Asset Agreement B(ii)EW

- Varying the prescribed form of charge
- “Amendment and Restatement”/ “Release when over-secured” criteria
- Property due diligence – City of London Law Society Certificate of Title
- Valuation requirements
- Insurance requirements
- Timetable

# Parent Company Guarantee

- Covenant strength of guarantor
- Unsecured creditor on insolvency of guarantor in absence of supporting security
- PPF guarantee – OECD countries only

# Bank Guarantee

- Cost
- “Evergreen” versus reducing
- PPF require evergreen guarantee

# Negative Pledge

- Restricts disposal of asset
- No ability to realise asset
- No covenant to pay
- Including representation and warranties/covenants from fixed charge/legal mortgage
- Negative pledge in relation to real estate – Restriction at Land Registry

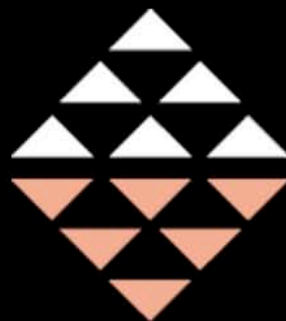
# Pension Funding Partnership

- Structure
- Ownership and control of assets
- Pension Scheme entitlements
- Advantages for employer
  - Reduction in cash contribution
  - Reduction in scheme deficit
  - Flexibility
  - “Regret risk”/avoids “trapped surpluses”

# Alternative Structures – Pension Funding Partnership

## ■ Risks/issues

- No direct recourse to assets
- Treatment of assets on insolvency
- Tax treatment on establishment
- Employer related investments
- Risk of inadvertent creation of charge/security interest
  - voidable if not registered at Companies House



This presentation gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.