



Institute  
and Faculty  
of Actuaries

# A New World of Regulation

Clive Pugh, Partner  
Richard Pettit, Partner



# Overview

---

- **Past cases**
  - **Top Ten Tips**
  - **Powers**
  - **Case studies**
  - **DWP Green Paper**
  - **Doing a deal**
-

**Silentnight**

# Silentnight - background

---

## Background

- **May 2011 –**
  - Pre-pack Administration
  - HIG acquired Silentnight for £19.2m
  - Scheme separated from Employer by insolvent sale
- **2014 –**
  - First Warning Notice - £17.2m
- **2015/16 –**
  - Trustees instruct ABL expert – Judgment paragraph 18
- **June 2016**
  - Second Warning Notice – full deficit (at relevant date)



## Judicial Review – findings of hearing

- **Is there an adequate procedure to provide a remedy?**
  - DP already provides a remedy procedure
  - That procedure includes an appeal process – Tribunal
  - Parliament intends that we use Regulator's Case Team, DP and Tribunal for these issues
- **Ultra vires?**
  - Existing system can consider this – Case Team already has
- **Unlawful exercise of power?**
  - As above – within remit of existing system

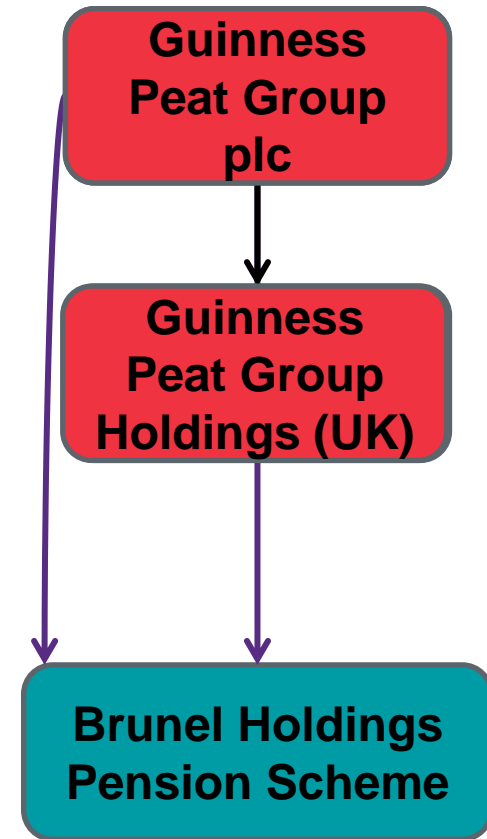


# **The Coats FSD Settlement**

# Coats – Background facts

## Background – Facts

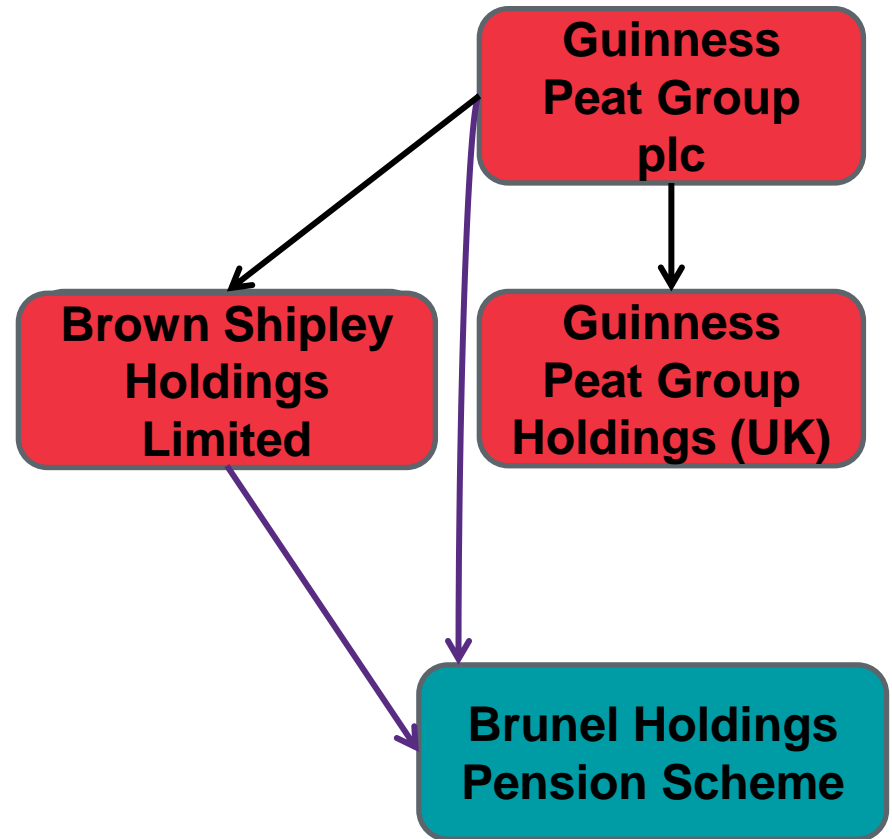
- **We acted for the Brunel Holdings Pension Scheme – one of three schemes**
  - Total s.75 Debt – over £1bn
- **Reverse takeover – 13 December 2002**
  - Brunel Holdings plc acquired share capital of Guinness Peat Group plc
  - Brunel changed its name to Guinness Peat Group plc
  - GPG changed its name to Guinness Peat Group Holdings (UK) Limited



# Coats – Background facts

## Background – Facts

- **Statutory Employer (2002 to 2005)**
  - Brown Shipley Holdings Limited – insufficiently resourced
- **Asset realisation programme (2011 to 2013)**
  - Generated £698m in cash proceeds – mostly earmarked for dividends
- **Trustees approached Regulator - 2012**
- **Warning Notice – 2013**
- **Settlement – December 2016**

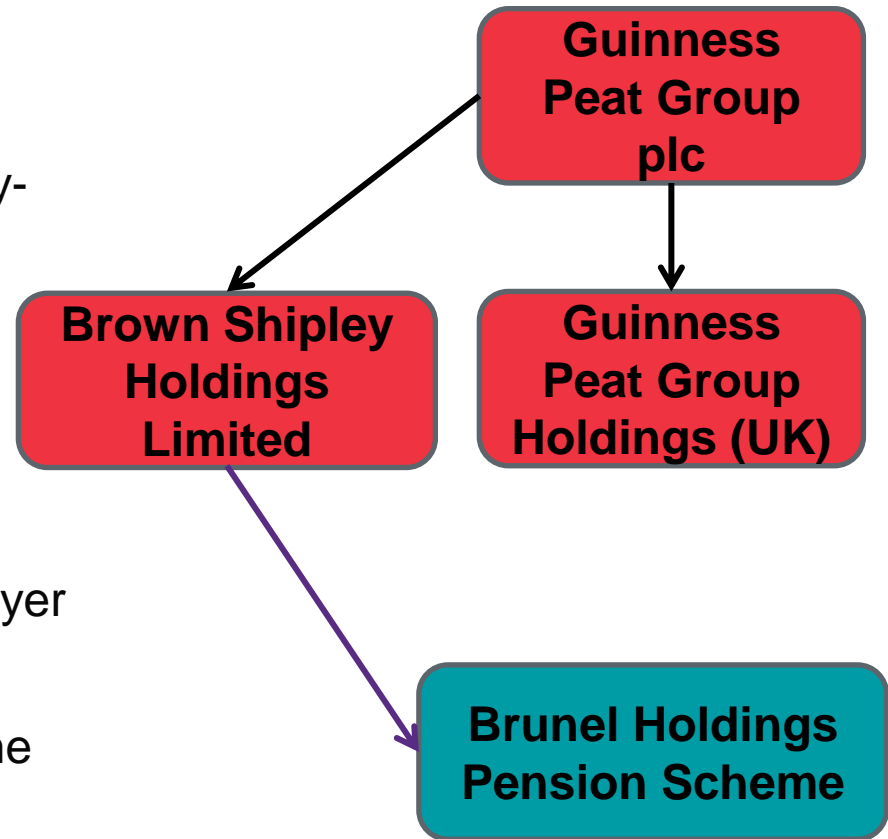




# Coats FSD Settlement

## How an FSD works

- **Service Company, or**
- **Insufficiently Resourced**
  - Poor employer (Assets < 50% Buy-out Debt)
  - Rich Friend “makes up the difference”
  - Connected/Associated
- **Is it “reasonable”?**
  - Relationship of targets with employer
  - Benefit flow
  - Involvement of targets with scheme
  - Financial circumstances
  - A non-compulsory, non exhaustive list.



# Coats FSD Settlement

---

## The “most important settlement”

- **Key Terms:**
    - £255.5m up front into the two schemes (BHPS and CPP)
    - Change statutory employer to Coats Limited – improve covenant
    - Full s.75 guarantee from Coats Group plc of the liabilities of the two schemes.
    - Agreed valuations and recovery plan
  - **Points of interest:**
    - Benefit flow?
    - None of the companies were insolvent
-

# Coats – Practical points to note

---

- **You can't out-spend the Regulator**
  - Targets spending £1m per month in fees
- **Process takes a long time**
  - Contacted Regulator – November 2012
  - Settled – December 2016



**Bernard Matthews**

# Bernard Matthews

---

- PPF informed of likely insolvency on 31 August 2016
- £30-40 million deficit
- Proposed pre-pack administration
- Work and Pensions Committee: “seems to have been carefully crafted...to extract maximum cash from the company and dump the pension scheme and other liabilities”.
- Potential levels of 1p in £1 for Scheme
- Scheme in PPF assessment period

“This could potentially be delivered by granting a prior ranking charge to the scheme trustees at the time the new investors take theirs”

- Alan Rubenstein, PPF CE

# Top Ten Tips

# Top Ten Tips

---

1. Thinking fast and slow – first impressions
2. The total package
3. Macro and micro effects
4. Saying sorry
5. It's not you, it's me
6. 72 and 191 – real powers
7. When is privilege relevant?
8. Do we all have time for this?
9. Public duties – in what context
10. Where is the boat heading?



**Powers**



# Powers - Regulator

---

## **s.72 Pensions Act 2004**

- Power to demand information and documents
  - Information to be provided in manner, place and period as specified
  - Notice to attend interviews
  - Explanation of any document or information
  - Criminal offence: refusal, delaying, obstructing, altering or destroying documents
  - Difficulty in sharing obtained information
-

# Powers – Pension Protection Fund (PPF)

---

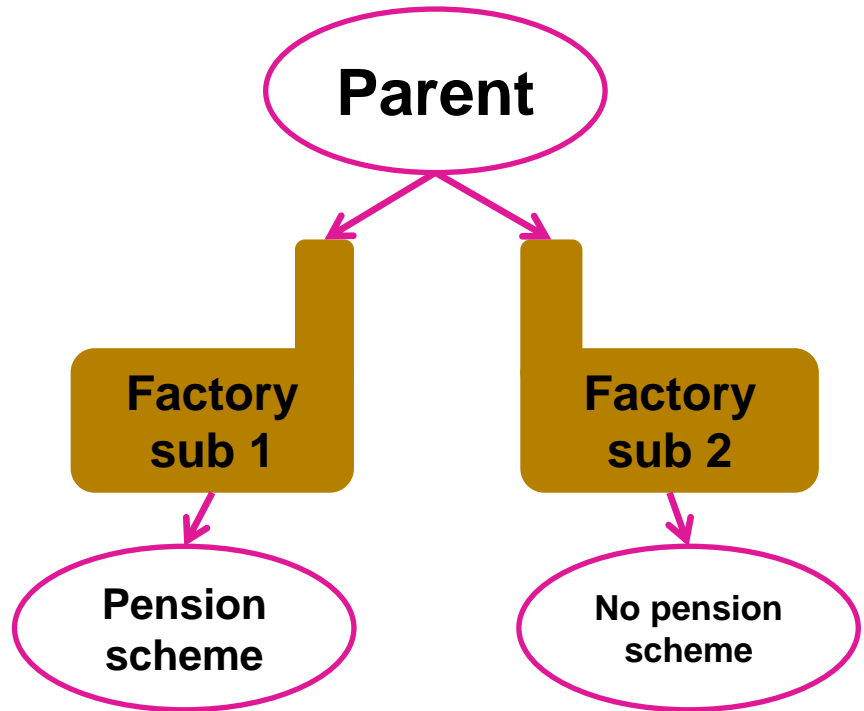
## s.191 Pensions Act 2004

- Broadly the same teeth as s.72
  - Information can be provided to another person as authorised by the PPF Board (s.190 authorisation)
  - Considerations
    - Authorised person's liability
    - Privilege
    - Costs
-

# Case studies

# Case study 1 – The M4 Comparison

- Parent with two companies
- Each subsidiary company with an identical factory either side of the M4
- One subsidiary with pension scheme
- Identical component production
- Non-pension burdened factory increases production



## Case study 2 – Offshoring, lower cost base

---

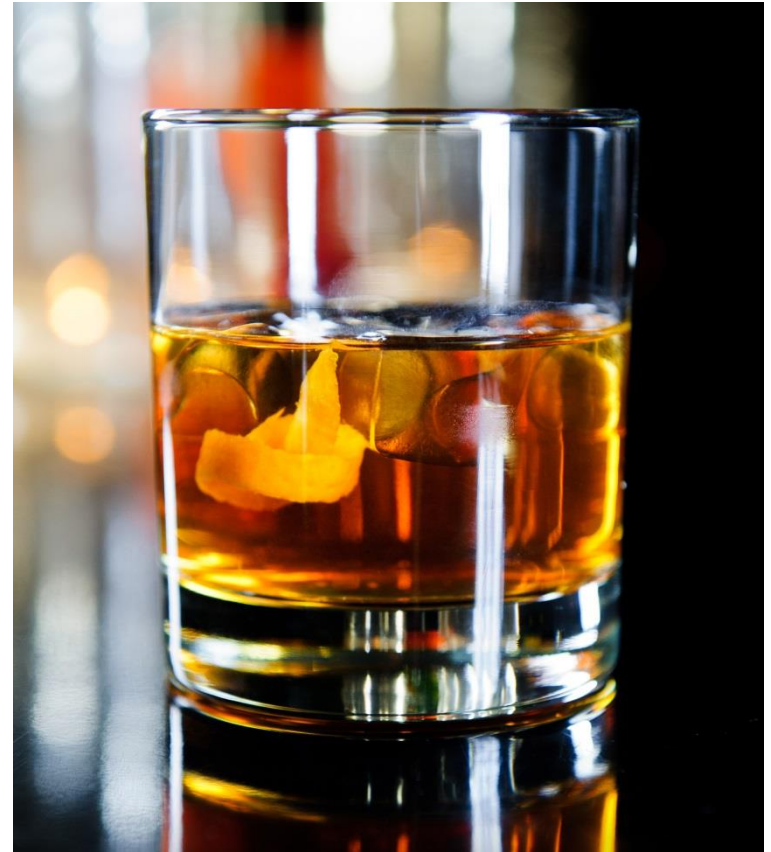
- England and Wales based component manufacturer with pension scheme
- Operations gradually relocate to Latvian group company
- Lower cost base
- England and Wales company assets sold as part of business relocation
- Third party contracts now entered into with Latvian company
- Potential moral hazard risk



## Case study 3 – Whisky, whiskey, or sake?

---

- Popular Scottish whisky business valued at £50 million
- Purchased for £100 million by Japanese spirits company
- Business plan to support company for 10 years only
- No direct financial benefit to Japan
- More pride than business
- Subsequent insolvency of UK company



# DWP Green Paper

---

## Intention to raise discussion around key areas:

- Funding and investment – Trustee skills
- Employer contributions – weak employers, stressed schemes
- Member protection – increase of regulatory powers; information; engagement with corporate transactions
- Consolidation – “the government believes there is a strong case for voluntary consolidation”

**Consultation closes 14 May 2017**

---



## Member protection – proposals

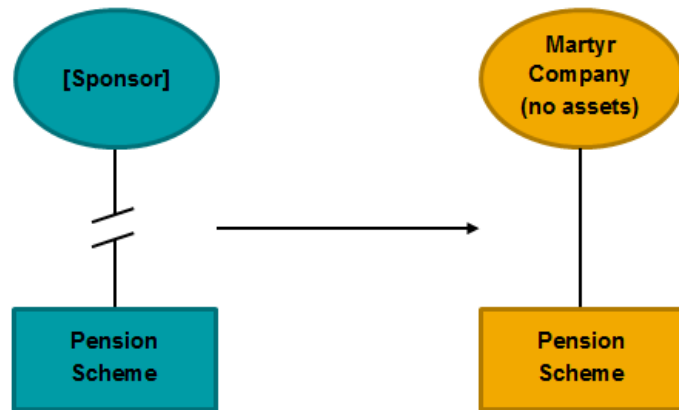
- Possible explicit standards and “comply or explain” regime
- Compulsory clearance of certain corporate activities in limited circumstances
- Substantial fines for corporate transactions with detrimental scheme impact
- Duty to co-operate and engage with regulator, backed with civil penalties
- Sponsors to provide engage and provide information to Trustees in timely manner
- Require consultation with trustees before payment of dividends if scheme severely underfunded
- Better communications with members

“Increasing powers of the Regulator is not something that should be taken lightly”

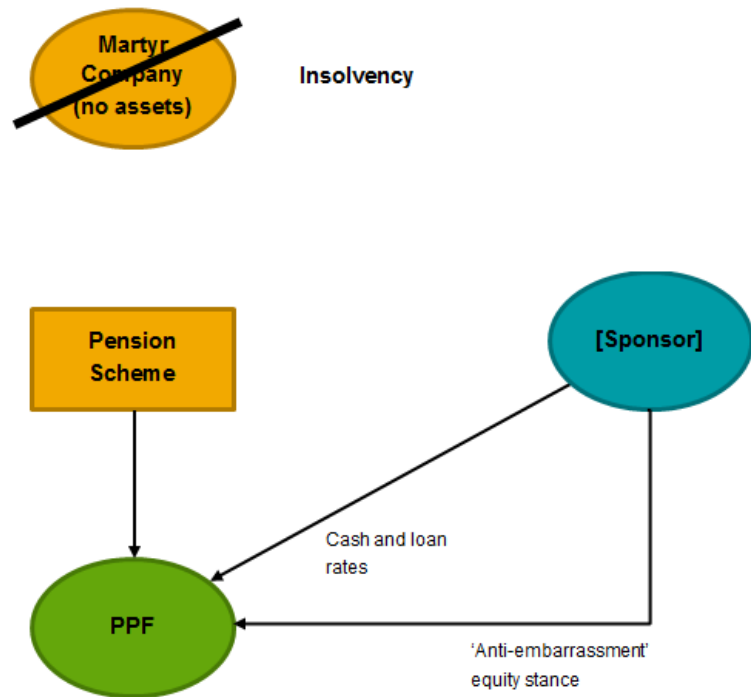
**Doing a deal**

# Regulated Apportionment Arrangement

## Breaking the Link

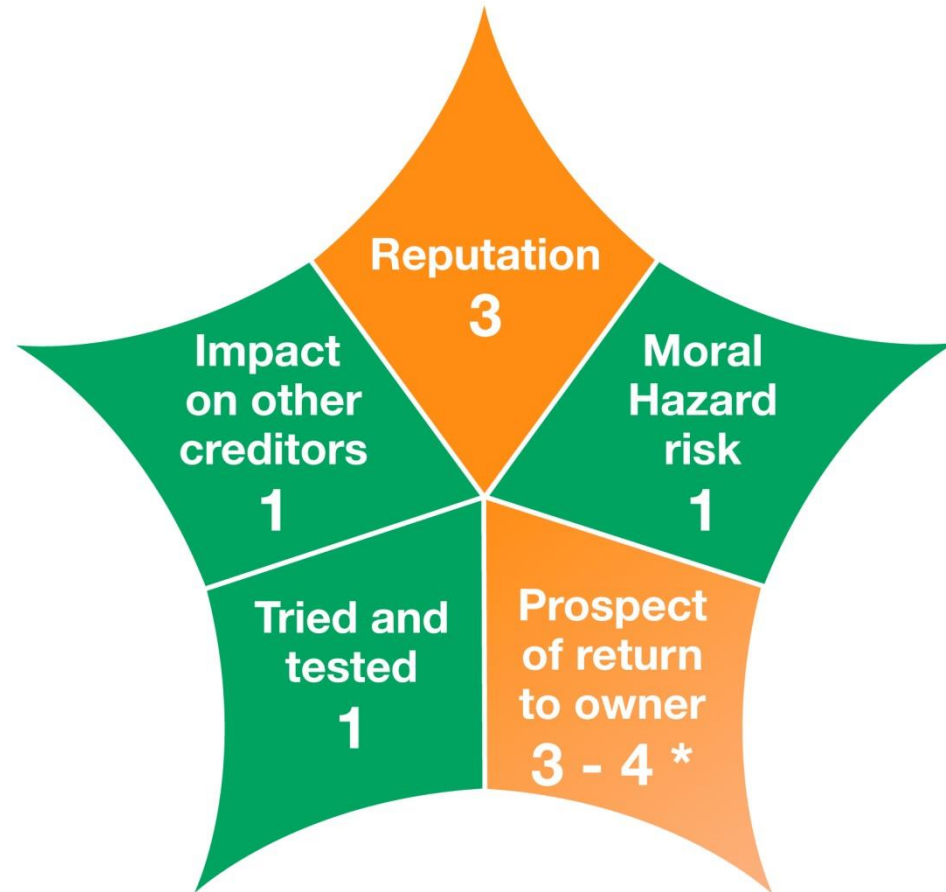


## Mitigation and Insolvency

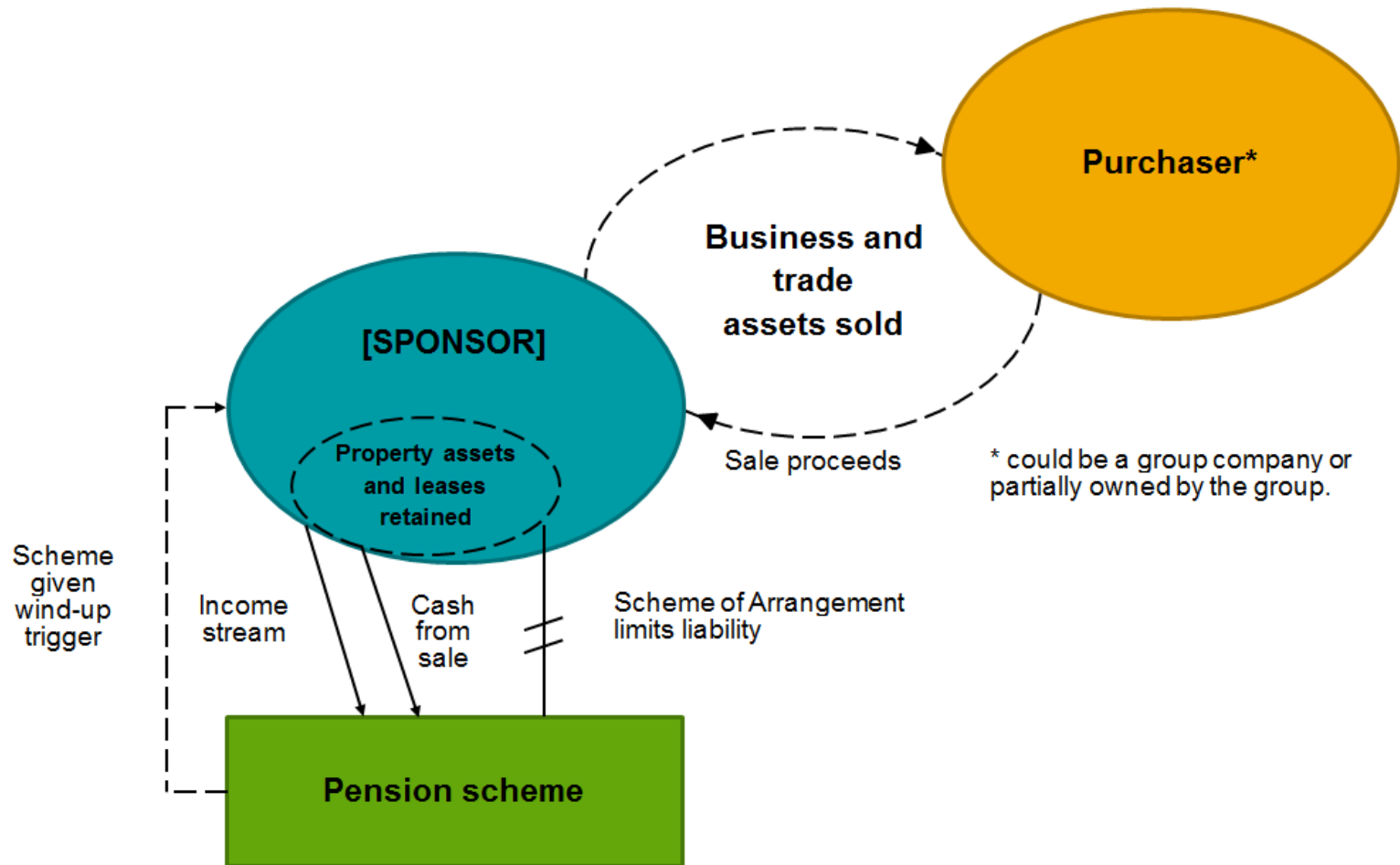


# Regulated Apportionment Arrangement

- Sponsoring employer transfers to martyr company
- Sponsor avoids insolvency in return for equity transfer to PPF
- Insolvency must be inevitable
- The Regulator and PPF only agree where better outcome than liquidation
- The Scheme/PPF equity stake of 10% to 33%



# Scheme of Arrangement

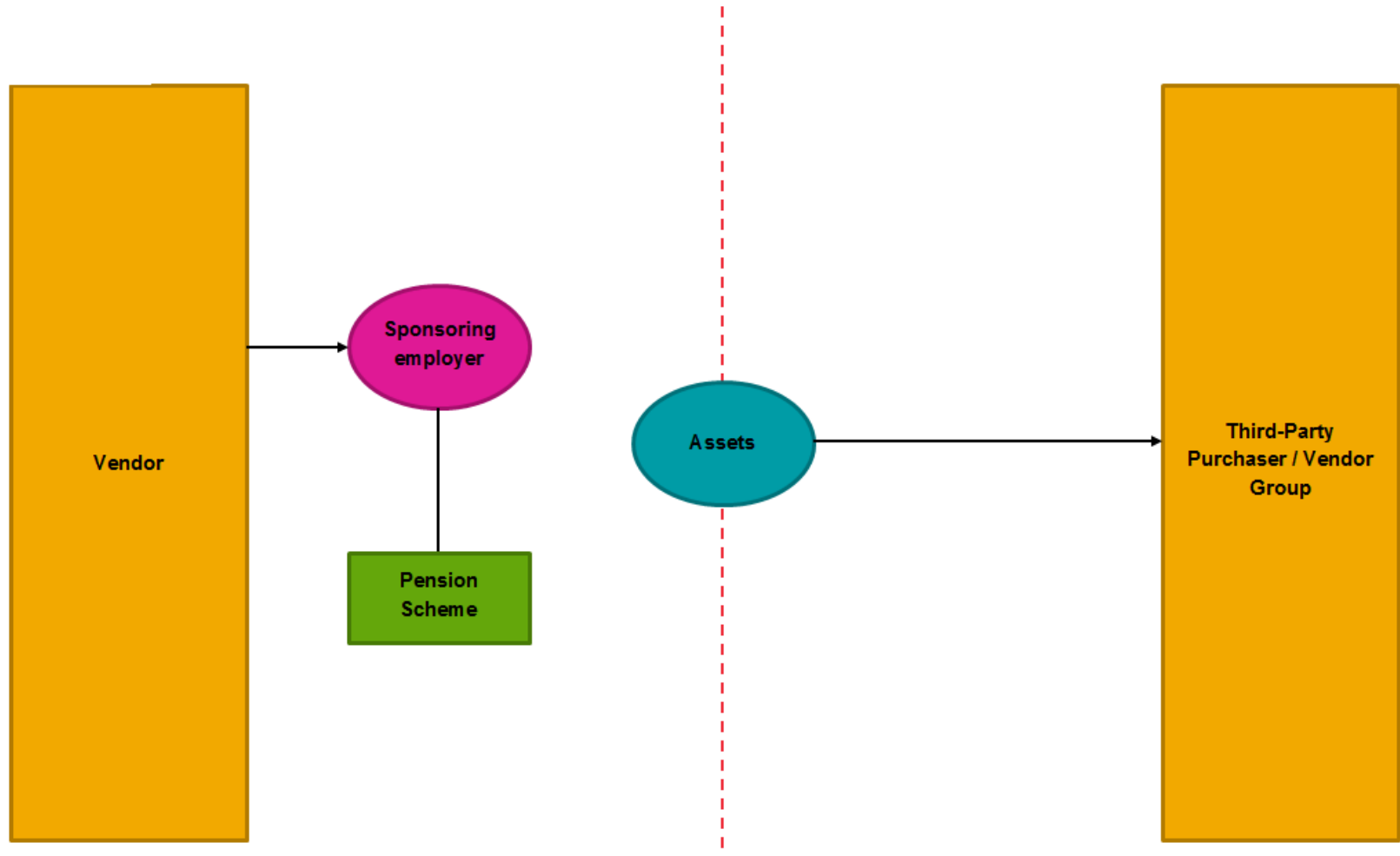


# Scheme of Arrangement

- Statutory procedure with agreement requirement from shareholder and/or creditors
- Sanctioned by court if a fair, reasonable, and a genuine attempt to reach agreement
- Regulator clearance
- Could allow for separation of Scheme/Employer
- May allow for sale of business with proceeds providing funding at, or above, PPF levels

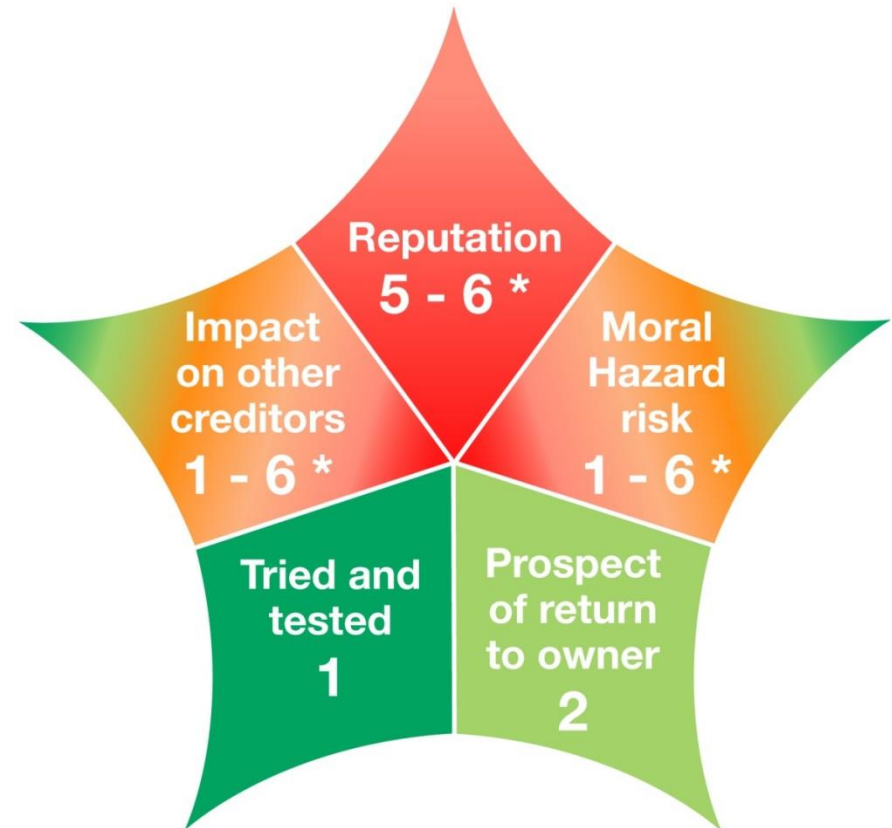


# Pre-pack Administration



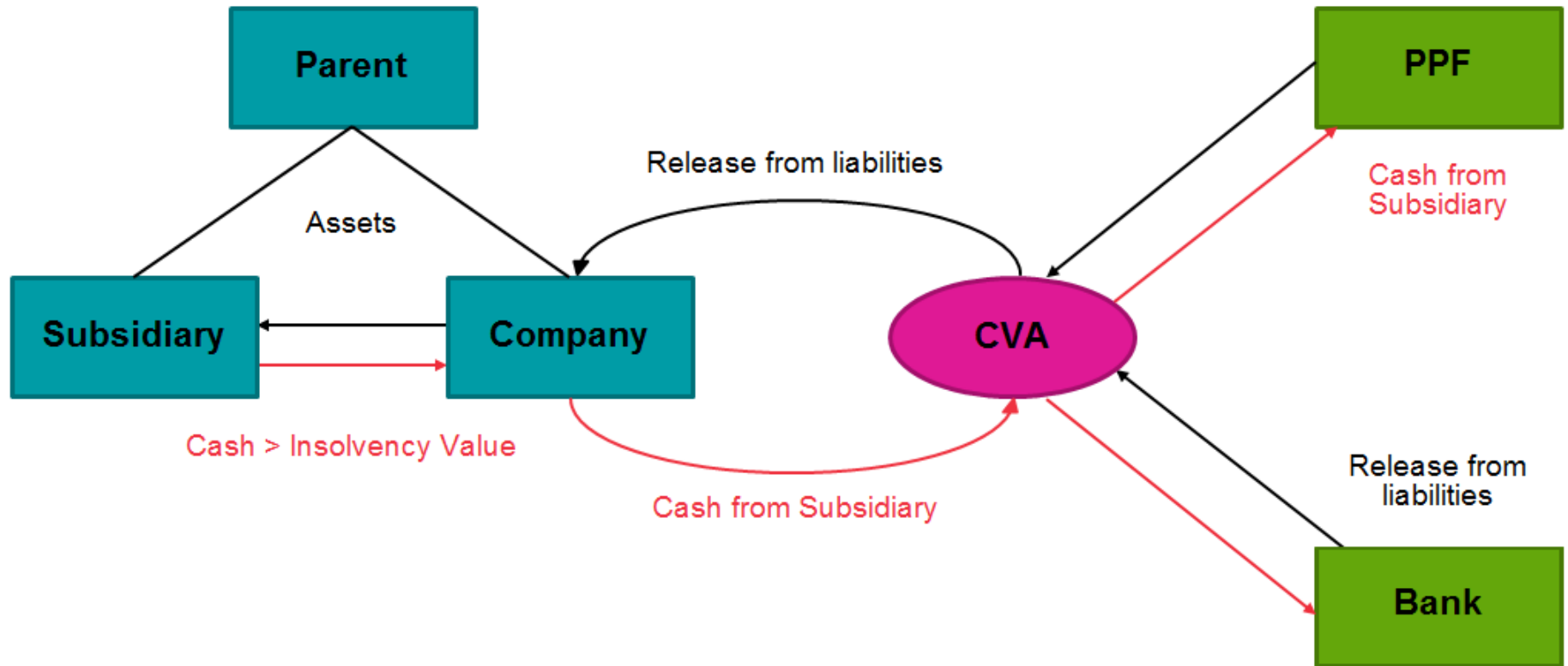
# Pre-pack Administration

- Company enters administration with business/assets immediately sold as agreed
- Liabilities remain with insolvent company
- Regulator can require anyone connected or associated to contribute in company's place
- Mitigation: connected or associated persons have financially supported company or sale out of administration not an undervalue
- Reputational issues





# Company Voluntary Arrangement

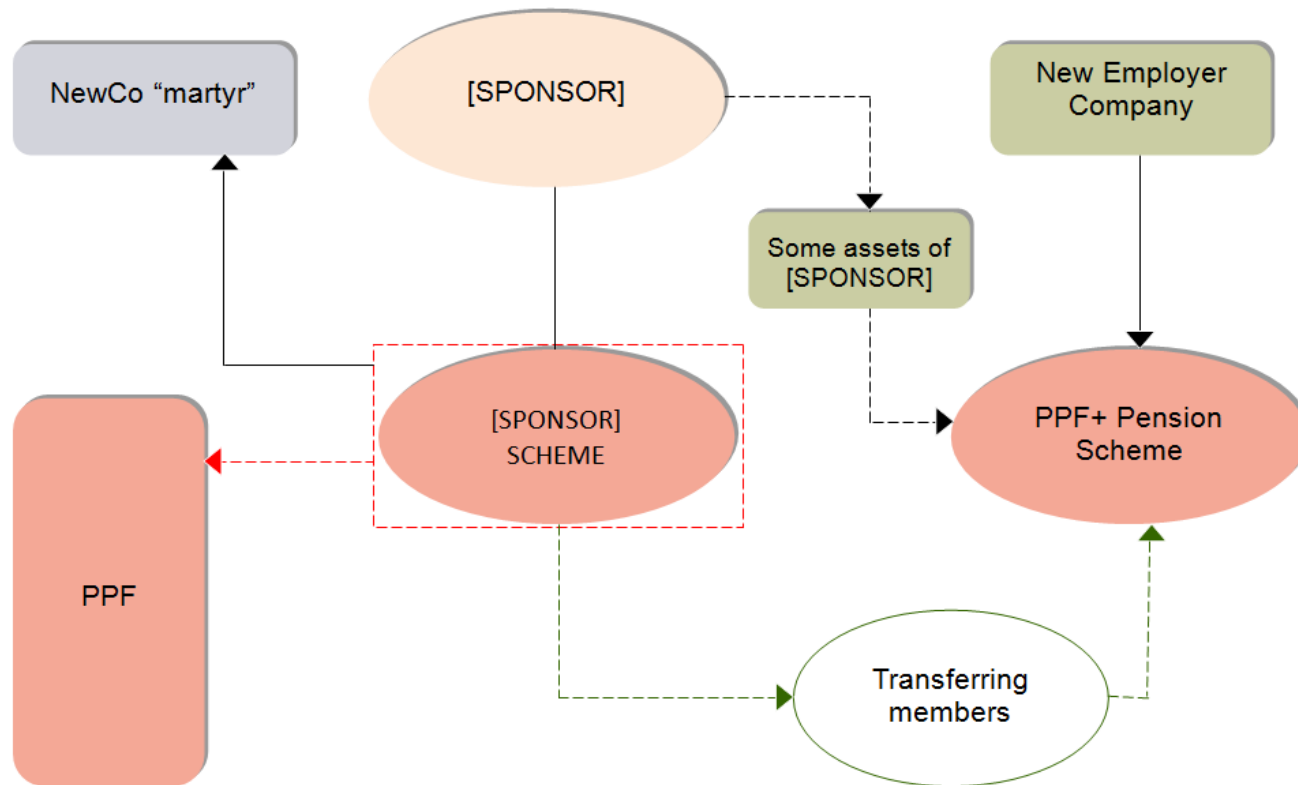


# Company Voluntary Arrangement

- Less formal but binding agreement with unsecured creditors – private agreement with potential reputational benefits
- Avoids appointment of administrator
- Triggers PPF assessment period – will only vote in favour where a scheme receives substantially more than through unmanaged insolvency
- PPF can accept amount lower than PPF level funding (unlike with an SofA)
- Regulator can act separately of PPF and could exercise moral hazard powers



# PPF + Scheme

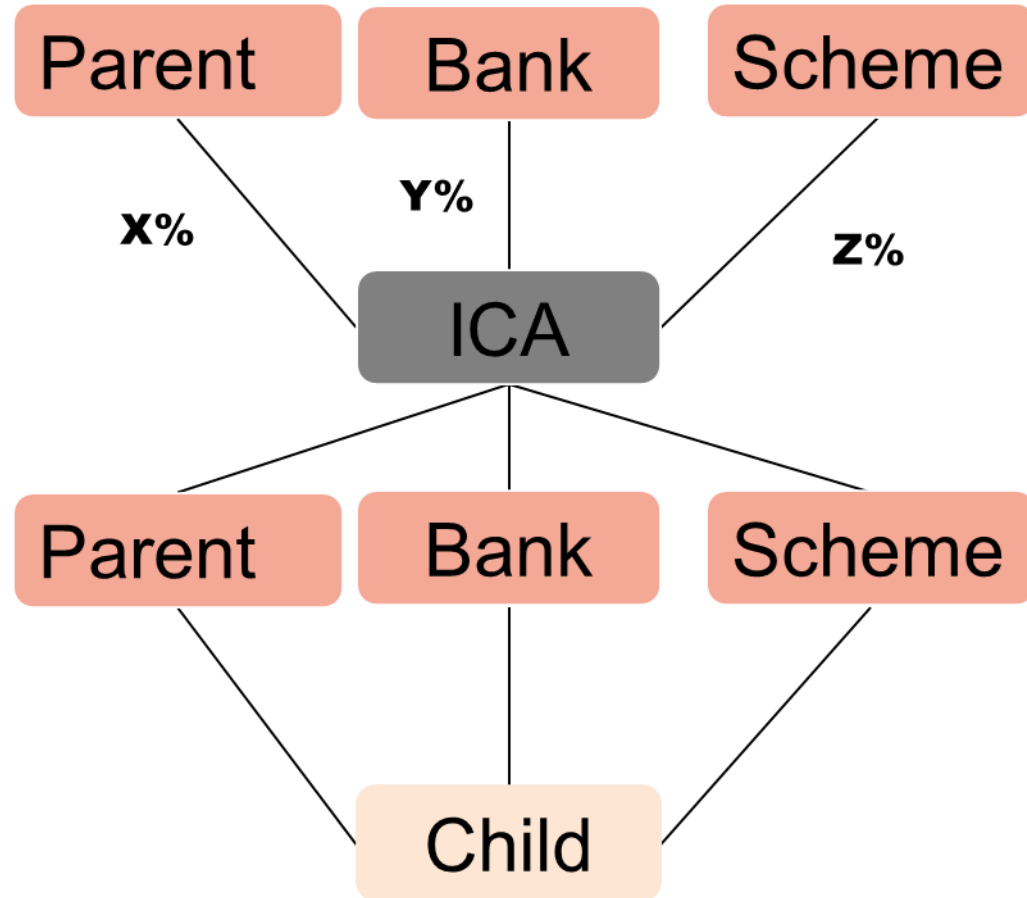
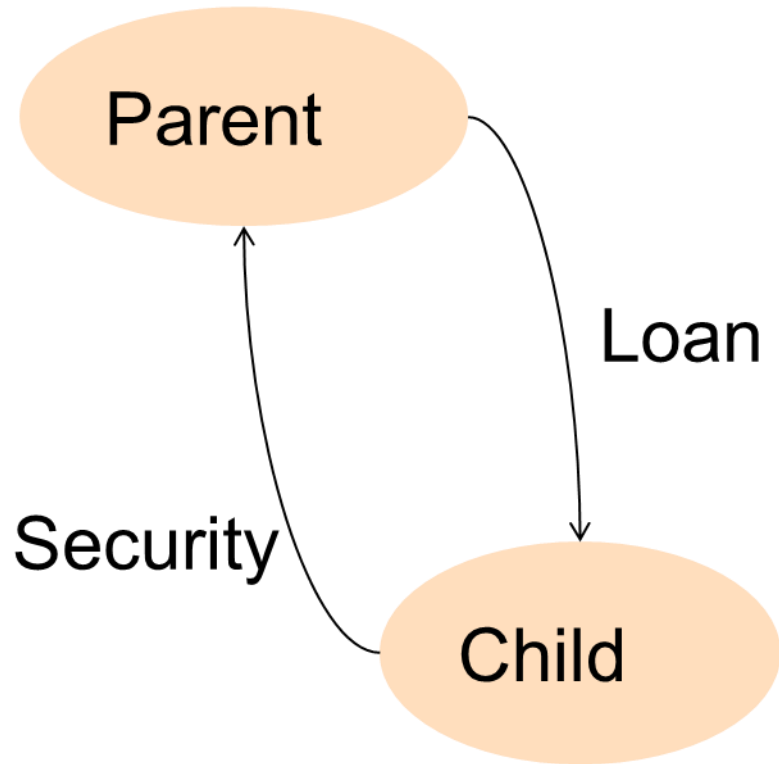


# PPF + Scheme

- May allow release where benefits of replacement scheme is in excess of PPF
- Insolvency of Company A must be inevitable
- New Company B as PPF+ sponsor
- Assets provided by Company A
- Members' choice whether to transfer
- RAA then transfers liabilities to martyr company
- Need to show will remain outside PPF
- Company A then free from any existing or future pension liabilities



# Secured Debt and Inter-Creditor Agreement



# Secured Debt and Inter-Creditor Agreement

- Security in relation to a scheme by lending companies within sponsoring employer's group
- Argument is that it is reasonable to take security up to the level of the payments being made to the scheme
- Monies not used for scheme funding, an inter-creditor agreement ("ICA") may be preferred
  - Contract to regulate respective rights of ranking creditors
  - Regulated distribution of proceeds and creditors rights to receive proceeds prior to any enforcement
  - ICAs in conjunction with facility agreements



## Comprising Employer Debt (Bradstock Agreements)

---

- **Compromise between employer and trustees**
    - Final sum paid by Employer for discharge of all liabilities
  - **Single figure or percentage of PPF buyout (normally 110%)**
  - **Not CVA or SofA so scheme is ineligible for PPF entry**
    - Trustees only enter contract if scheme brought above PPF levels
  - **Costs of covenant advice and final buyout terms need to be considered in the final sum agreed**
  - **Regulator clearance should be sought**
-

# Questions

# Comments

The views expressed in this presentation are those of invited contributors and not necessarily those of the IFoA. The IFoA do not endorse any of the views stated, nor any claims or representations made in this [publication/presentation] and accept no responsibility or liability to any person for loss or damage suffered as a consequence of their placing reliance upon any view, claim or representation made in this presentation.

The information and expressions of opinion contained in this publication are not intended to be a comprehensive study, nor to provide actuarial advice or advice of any nature and should not be treated as a substitute for specific advice concerning individual situations. On no account may any part of this presentation be reproduced without the written permission of the IFoA or the author



Institute  
and Faculty  
of Actuaries