

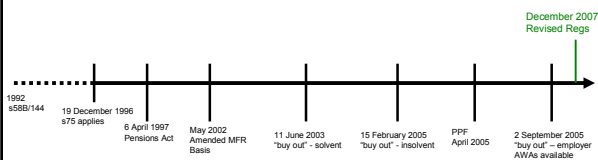
Section 75 – Practical Issues

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Agenda

- A brief history of section 75 Pensions Act 1995
- Triggers for s75 debts
- Employment Cessation Events
- Calculating debts – Scheme / Employer - **CURRENT**
- GN19 apportionments
- Apportionment rules – some cases
- Approved Withdrawal Arrangements
- **CALCULATING DEBTS - PROPOSALS**
- Compromises and PPF entry rules
- Former employers and sectionalised schemes
- Operating partial wind up rules

Section 75 Pensions Act 1995 – a Timeline



- Commencement of winding up
- Applicable Time
- S75 debts are unsecured
- Rules may impose higher burden

Triggers for Section 75

- Scheme wind up (any time during the wind up prior to a Relevant Event) - when does wind up occur?
- Immediately before a Relevant Event (individual employers) – normally an insolvency event– eg K&J Holdings Case (2005)
- Employment Cessation Event – multi-employer schemes

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Employment-Cessation Event

- Regulation 6(4) of the debt regulations:-
"an employment-cessation event occurs in relation to an employer if he ceases to be an employer employing persons in the description of employment to which the scheme relates at a time when at least one other person continues to employ such persons."
- Ceasing to employ active members/ waiting period?
- Employees who are deferred members/ life cover only?
- Active members in a (non segregated) DC Section?
- Ceasing to employ active members (whether or not other actives)! – 12 month grace period

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Calculating Debts (a lawyer's view)

Scheme Wind up

- The value of assets is less than amount of liabilities
- Assets and liabilities determined by a "prescribed person in the prescribed manner"
- An amount equal to the difference shall be a debt
- Employer Debt Regulations specify how assets and liabilities are to be valued
- Result to be certified by the actuary – Schedule 1 to Debt Regulations

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Calculating Debts – Scheme wind up

- Liabilities
 - On the assumption that benefits will be discharged by the purchase of annuities; and
 - All expenses the trustees consider will be incurred
 - **Set by Trustees in consultation with actuary**
 - **Need Valuation if >12 months after effective date**
- Assets
 - In accordance with (amended) MFR Regulations
 - GN27 and GN19
 - Audited statement of assets?
 - **Set by Trustees in consultation with auditor**

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Calculating Debts – Partial wind up

- Multi- employer Schemes
 - Employer's "share of the difference"
 - *"such proportion of the total difference as, in the opinion of the actuary after consultation with the trustees or managers, the amount of the scheme's liabilities attributable to employment with that employer bears to the total amount of the scheme's liabilities attributable to employment with the employers"*
 - Include expenses for employment-cessation event
 - Determined and certified in accordance GN19

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GN19 Apportionments

- Employer's share of the difference issues in practice:
 - Need to value the whole deficit (capacity)
 - Orphaned liabilities
 - Transferred in benefits – **will fix to employer at time**
 - Data problems – **last employer will take all liability**
- *Cornwell v Newhaven Ports (2005)*

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Apportionment Rules

- Reg 6(2) an employer's share of the difference is -
 - (a) [GN19 basis]; or
 - (b) "if the scheme provides for the total amount of that debt to be otherwise apportioned amongst the employers, the amount due from that employer under that provision"
- Reg 16 (2) – if an apportionment could not otherwise be achieved – Trustees may apportion (should they?)

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Examples of Apportionments

- Phoenix Ventures (2005) - MG Rover
- Background – power of amendment
 - "if a **debt arises** under s75A of the 1995 Act when the scheme commences winding up, the debt shall be apportioned amongst the Employers in such shares as the Trustee in its absolute discretion determines"
- GN19 - £200,000 – Trustees claimed joint and several £400m then tried to apportion £25m
- Driven by PPF considerations

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Phoenix Ventures

- Power of apportionment cannot be exercised until debt arises
- Debt arises when the actuary has done his GN19 certification (and not before)
- Joint and several liability is not an apportionment
- Trustees mistaken on PPF entry rules
- Debt was £200,000 – sufficient for PPF

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L v M

- October 2006 – Mr Justice Warren
- PPF Pre-pack (Regulator and PPF consent)
- Rules applied £1 to the Employer and the rest to a Newco – Employer then sold and Newco liquidated
- Questions re operation of PPF Entry Rules and whether apportionment rule was a compromise
- Held that if apportionment agreed before a relevant event or employment cessation event then no compromise for PPF purposes

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Approved Withdrawal Arrangements

- Regulation 7 and Schedule 1A of Debt Regs
- Pension Regulator approval (Guidance issued)
- Employer pays lower debt (Amount A) \geq MFR
- Actuarial certificate Schedule 1B (MFR basis)
- “Guarantors” agree to meet Amount B
- Debt is “more likely to be met if AWA is approved”
- AWA to meet requirements of Schedule 1A
- Expect consultation on amendments

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Employer Debts – The proposals

- Four ways to calculate debt:
 - Liability Share – default
 - Scheme Apportionment Arrangement
 - Regulated Apportionment Arrangement (rare!) PPF
 - Cessation Agreement – DIY AWA
- Amount A on scheme specific basis – lower with Regulator approval – relevant transfers
- Still have AWA but more likely test replaced
- New Actuarial certificates

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Compromises and PPF Entry Rules

- Bradstock case (2002)
- Trustees' power under s15 Trustee Act 1925
- Could not compromise until wind up commenced (LvM questions) – MFR debts
- Early 2004 onwards concern re Moral Hazard
- 2005 onwards concerns re PPF and Entry Rules (see LvM) **Regulations will cover this**
- What about a compromise at above PPF?

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Former Employers

- Reg 9 of the Employer Debt Regs
 - Important for Corporate Sales / Purchases
 - Need to ensure target no longer under liability
- Company ceases to be employer when s75 debt paid (or if no debt was due or notified)
- Deeds of cessation
- Reg 9(1) - references to employers
 - "include every person who employed persons in the description of employment to which the scheme relates, immediately before the occurrence of the event after which the scheme ceased to have any active members."*
- May still be PPF employer

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Sectionalised Schemes

- Sections treated as separate schemes for s75 purposes
- Contributions to and assets of sections must be treated separately – except on winding up (cf PPF rules)
- Trust difficulties of sectionalising existing schemes

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Partial Wind Up Rules

- Apply separately from the legislation
- Depend on the particular trust deed
- Trustees to identify share of fund and apply
- What if fund proves insufficient?
- Not clear on interaction with s75 and PPF
