High Court rules on when amendments disqualify a scheme from the PPF

The High Court has given helpful guidance in L and others v M Limited on when a scheme is disqualified from the Pension Protection Fund (PPF) as a result of the trustees reaching an agreement with the participating employers about how the deficit should be shared among those employers, in order to work out the s75 debt due from each employer. The key messages are:

- A scheme will not be excluded from the PPF where the agreement is made before the event that triggers the s75 debt
- There is some doubt if the agreement is made after the triggering event

What is the background? A debt under s75 of the Pensions Act 1995 (a "s75 debt") is triggered where, broadly, a defined benefit scheme begins to wind up, a participating employer ceases to have employees who are members of the scheme, or a participating employer becomes insolvent. However, a case in 2005 (Phoenix Venture Holdings Limited v Independent Trustee Services) said that the s75 debt cannot be due until the overall deficit in the scheme has been calculated by the actuary.

The Occupational Pension Schemes (Employer Debt) Regulations 2005 say that the rules of the scheme can set out how the total deficit in the scheme is to be shared between the participating employers to establish the amount of the s75 debt due from each employer.

However, the Pension Protection Fund (Entry Rules) Regulations 2005 (the "PPF Regulations") say that a scheme ceases to be eligible for the PPF if the trustees enter into a legally enforceable agreement which reduces the amount of any s75 debt due to the scheme which may be recovered.

This apparent conflict between two sets of regulations has caused problems for trustees and employers who often have good reasons for wanting to reach agreement on how a s75 debt due from a participating employer should be determined.

What happened in L and others v M Limited**?** M Limited (M) was in financial difficulties. As part of a restructuring of M's liabilities it was agreed that a new employer (Newco) should become a participating employer in M's defined benefit pension scheme, in addition to M.

The scheme rules would be amended to provide that £1 of the total deficit in the scheme should be apportioned to M, with the balance to Newco, if a s75 debt was triggered.

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The scheme would then start to wind up, triggering a s75 debt. M would pay £1. Newco would be liable to pay the balance of the total deficit, which it would not be able to afford, and so would suffer an insolvency event. The scheme would then be assessed for entry into the PPF. The PPF would take an equity stake in M in return for entry into the PPF. The ultimate aim was to enable the scheme's liabilities to be taken on by the PPF.

The trustees of the scheme sought guidance from the High Court on whether these transactions would result in the scheme ceasing to be eligible for the PPF.

What did the High Court decide? The court held that the scheme would not be excluded from the PPF. A scheme can only be excluded if a s75 debt is "due" at the time of the agreement. In this case no s75 debt was due because the triggering event for the debt (winding-up) had not yet occurred. A scheme is not excluded from the PPF where an agreement reduces a s75 debt that will or may become due as a result of a triggering event in the future.

However, the court did not deal with the question of whether the PPF Regulations could lead to exclusion from the PPF where an agreement is reached between the date of the triggering event (for example, winding-up) but before the debt is calculated by the actuary.

What does this mean for trustees and employers? This decision makes it clear that, where a triggering event for a s75 debt has not already happened, trustees and employers can reach agreement on how the deficit is to be shared among the employers.

It remains unclear whether an agreement to share a deficit can be made after a triggering event has happened but before the deficit is calculated by the actuary. It seems likely that a further decision from the courts will be needed on this.

In the meantime, the safe view is that trustees and employers who want to reach agreement on how the deficit is shared should plan ahead and get the agreement in place before a triggering event for a s75 debt happens.

Case: L and Others v M Limited [2006] EWHC 3395 Ch.

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February 2007