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Pensions Legal Update

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SEA CONTAINERS: FIRST ISSUE OF FINANCIAL SUPPORT DIRECTIONS

The Pensions Regulator has decided to issue two Financial Support Directions

Summary. The Pensions Regulator has decided to issue two Financial Support Directions.

Background. If the Pensions Regulator considers a participating employer in a defined benefit occupational pension scheme to be "insufficient resourced" or the participating employer is a "service company", it has the power to issue a Financial Support Direction ("FSD") to associated or connected companies ordering them to provide financial support to the pension scheme. For example, the financial support might take the form of a parent company guarantee or a charge over assets. The support provided must stay in place until the scheme winds up. The Regulator is required to act reasonably in issuing a FSD. If a FSD is ignored, the Regulator can issue a Contribution Notice ("CN") for a specified sum, which can be pursued through the civil courts (*Pensions Act 2004 sections 38-51*).

Facts. On 18 June 2007, the Pensions Regulator announced its intention to issue two FSDs against Bermudan-based Sea Containers Ltd ("SCL") in respect of two defined benefit pension schemes of its UK subsidiary (Sea Containers Services Ltd ("SCSL")). The FSDs will be issued within 28 days from 18 June 2007 unless an appeal is lodged within the 28 day period.

A Services Agreement set out the relationship between the two companies and showed that SCSL provided such services to SCL as it reasonably required.

In June 2006 SCL gave notice to terminate its participation in one of the schemes. This was viewed by the schemes' trustees as an indication SCL would no longer support the schemes and the schemes' trustees contacted the Regulator.

In October 2006 SCL and SCSL filed for Chapter 11 bankruptcy in the US in order to achieve a financial restructuring.

Decision. The Regulator believes that SCL, as parent company, must provide financial support in relation to SCSL's under-funded pension schemes. SCL is therefore responsible for any debt under Section 75 of the Pensions Act 1995 in the two schemes attributable to SCSL. The most recent estimate of the Section 75 debt in the two schemes is approximately £130 million.

The Regulator concluded it was reasonable to issue two FSDs for the following reasons:

- SCSL is a service company connected with SCL;
- SCSL's function and position in the Group (a wholly-owned and controlled subsidiary providing services not usually remunerated for) meant that SCL benefited from SCSL; and
- the FSD facilitates a claim against SCL in the Chapter 11 bankruptcy and it enables the schemes' trustees to rank equally with other creditors, but does not give the trustees preferential priority over other creditors. If the US Bankruptcy Court does not approve compliance with the FSDs then SCL can raise that when the Regulator is considering whether to issue a CN.

The FSD facilitates a claim against SCL in the Chapter 11 bankruptcy and it enables the schemes' trustees to rank equally with other creditors

Comment. This is the first time the Pensions Regulator has issued a FSD since it acquired the powers to do this on 6 April 2005.

Source: Reasons of the Determinations Panel of The Pensions Regulator in relation to the Determination Notices issued on 15 June 2007 re: The Sea Containers 1983 Pension Scheme and The Sea Containers 1990 Pension Scheme.

DIRECTORS' INDEMNITIES

Summary. The legislation concerning indemnities for directors of trustee companies is being amended on 1 October 2007.

The legislation concerning indemnities for directors of trustee companies is being amended on 1 October 2007

Background. UK company law is being completely overhauled by means of the Companies Act 2006. Provisions in the Act restricting the ability of a company to give an indemnity to directors of that company or of another company in the same group come into force on 1 October 2007. Regulations made under the Act explain how the Act affects indemnities which are already in place. As a result, some clients whose schemes have a company as trustee will need to review any indemnity provisions in the scheme's trust deed and rules to ensure that those provisions are not rendered unlawful by the Act.

Review. Clients may need to review indemnity provisions where:

- The trustee, or one of the trustees, of their scheme is a company.
- That company is part of a group of companies which includes the principal employer or other employers participating in the scheme.
- One or more of those other group companies is giving an indemnity to the directors of the trustee company (this will normally be the result of a provision in the scheme's trust deed and rules).
- The indemnity is wide enough to protect the directors of the trustee company against liability for a fine imposed in criminal proceedings, a penalty imposed by the Pensions Regulator or costs incurred by the director in defending criminal proceedings in which the director is convicted. (Under the 2006 Act, directors' indemnities will not be able to cover such liabilities.)

The new provisions in the 2006 Act only apply to indemnities made on or after 1 October 2007 (but there is similar legislation applying to indemnities made on or after 29 October 2004 but before 1 October 2007)

Even when these conditions apply, it still may not be necessary to alter the indemnity. The new provisions in the 2006 Act only apply to indemnities made on or after 1 October 2007 (but there is similar legislation applying to indemnities made on or after 29 October 2004 but before 1 October 2007).

The new Act does not apply to companies buying director's liability insurance for directors of that company or another group company. And it does not apply to indemnities (or premiums for trustees' liability insurance) payable out of the assets of a pension scheme – though s256, Pensions Act 2004 prevents such indemnities or insurance premiums being paid out of scheme assets where they cover the trustees for fines imposed in criminal proceedings or penalties imposed by the Regulator.

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