Employer debt questions

April 2010

Importance ★★★★☆

A recent case has raised questions about when a s.75 employer debt arises in a multi-employer pension scheme. Groups may want to review past corporate and pension scheme restructurings to see what the *Cemex case could mean for them.**

The good news is that we are waiting for judgement in another case – *Pilots*** – that involves similar issues and could well answer some of the questions. But this decision is not expected for several months. There are no plans for an appeal in *Cemex*.

The case has come as a surprise to many lawyers. It is open to doubt in a number of ways and might not be followed in future cases.

Depending on the outcome of *Pilots*, the Department for Work and Pensions might think it needs to amend the employer debt legislation.

Decision

- *Cemex* is about events in 2005 when the old definition of the trigger for a s.75 debt applied. This was ceasing to employ "persons in the description of employment to which the scheme relates" (without being the last employer to do so). It was widely thought this referred to the moment when an employer no longer employed any active members.
- But *Cemex* has now decided that a debt was not tripped until an employer ceased to employ (a) anyone with benefits in the scheme and (b) anyone who could possibly join it. In many cases this would mean an employer would only incur a debt when it ceased to employ its entire workforce.
- On 6 April 2008 the legislation was reworded to make clear that the trigger is ceasing to employ actives. Despite this, the way the legislation was amended means that the old definition of the trigger, as interpreted in *Cemex*, is still alive and can dictate the legal effect of events that happen today and in the future.
- *Cemex* is open to a number of criticisms. It might not be followed in *Pilots* or other future cases.

Consequences

Employers, trustees and their advisers now wait for answers to the questions *Cemex* raises. Meanwhile they are left to consider the implications **if** the decision is correct. Here are some of them.

Corporate restructuring – past

- An employer that paid a s.75 debt when it ceased (before 6 April 2008) to employ actives may have done so unnecessarily if it continued to employ, say, deferreds or people who could join. It might now want to try to recover its money from the trustees.
- If such an employer paid a modest amount based on MFR (that applied before the debt went up to buy-out), it might think it has cleared its s.75 liability for good and elect not to recover what it paid. But this does not work: having not in fact tripped s.75, it can still do so in future – and now at buy-out level.
- Where companies or businesses have been sold, does the buyer, or perhaps the seller, have a claim under any of the warranties or indemnities in the sale and purchase contract? The parties often agree that these protections should only apply for a limited time, like a year. Would a claim be in time?
- *Cemex* can have the effect of postponing the crystallisation of a debt for many years after a company has been sold outside the group that sponsors the pension scheme. The trustees could find it hard to keep track of their potential s.75 debtors and to know when any of them becomes liable.

Corporate restructuring – future

- Groups will need to factor any uncertainty over the s.75 position of their companies into any plans for current or

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future restructurings. This applies as much on internal re-organisations as on sales outside the group.

Scheme restructuring – past

- Ending accrual for all employers at the same time before 6 April 2008 did not trip s.75 and was thought to mean that no future change in the workforce could lead to a debt.

Cemex now makes it arguable that (at least until 6 April 2010 when the legislation changed again) an employer could still incur a debt if, for example, it sold its business and transferred out all its employees. This is a possible reading of the legislation but it might be one that a court would reject as too literal.

Comment

It is difficult to judge how to react to *Cemex*. It may be that *Pilots* or new legislation will mean that it will have little or no general application. On the whole, we think there is a fair chance that *Pilots* will bring helpful clarification (though it may have to go to the Court of Appeal to do so).

On the other hand, prudent risk management may argue for taking a more pessimistic view and at least doing preliminary work to assess the impact if *Cemex* does turn out to have general effect.

On these grounds we suggest:

- employers and trustees consider reviewing past corporate and scheme restructurings in the light of *Cemex*,
- employers pause and consider the effect of the case on any current or future restructurings, and
- employers consider whether to give notice of a potential claim under any warranties or indemnities they received on any sales or purchases of companies or businesses.

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* Cemex UK Marine Ltd v MNOPF Trustees Ltd.

** PNPF Trust Company Ltd v Taylor, a case involving marine pilots.

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