



The court has ruled against an attempt to exploit the Pension Protection Fund. This is good news for levy payers. But it opens up questions about what amounts to a misuse of the PPF.

The Ilford Pension Scheme has a deficit that would qualify it for the PPF. But before putting the scheme into the PPF its trustee planned to spend the bulk of the assets in buying out the excess of scheme benefits over PPF compensation. The trustee asked the court whether its plan was lawful.

The advantage for members was that the buy-out policy would bridge the gap between their PPF compensation and their scheme benefits. But the cost would fall on the PPF because it would take in a scheme with a much bigger deficit.

Protecting the PPF

The court found the plan unlawful. The scheme's buy-out rule could only be used for its proper purpose of providing, outside the scheme, the benefits members were already entitled to. No more than a fair share of scheme assets could be used; and in working out a fair share the trustee could not count the right to PPF compensation as a scheme asset.

Even if the scheme was amended to widen the purpose of the buy-out rule, the trustee would still be unable to take the existence of the PPF into account because the proposal was "a blatant attempt to undermine or circumvent the policy of the PPF legislation". Putting his public policy argument into legal terms, the judge held that the existence of the PPF was an irrelevant consideration when the trustee was working out whether to exercise its buy-out power. As with any other decision, the trustee's duty was to consider only relevant matters.

The judge was candid about his concern that if he endorsed the buy-out, the floodgates would open on the PPF. The case is *Independent Trustee Services Ltd v Hope*.

Comment

This is a strongly worded judgment warning schemes not to exploit the PPF. It means that any deliberate attempt to manipulate a scheme to inflict extra cost – or, presumably, a material risk of extra cost – on the PPF is likely to be unlawful.

But it is only a first step in defining the sort of moves that will count as a play on the PPF. What about keeping accrual open when there is a material risk of the employer becoming insolvent? Paying unreduced CETVs? Even agreeing a long recovery plan – or is complying with scheme funding sufficient to put a scheme in the clear?

The judge accepted that there are circumstances in which it is right for trustees to recognise the existence of the PPF e.g. in deciding whether and when to trigger an insolvency event and in checking plans they make against the PPF entry rules. But where is the line?

One way or another trustees are likely to have to be clearer about the basis of their decisions and more careful about creating an audit trail of what they have and have not taken into account.

Will the PPF now find itself giving informal clearance by confirming that it will not challenge proposed actions as unlawful? If so, there is an argument that the procedure should be statutory (perhaps a new leg to moral hazard?) and should involve the Regulator as well as the PPF.

Disclaimer: This stop press gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

© Burgess Salmon LLP 2009. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burgess-salmon.com.

Burgess Salmon LLP, Narrow Quay House, Narrow Quay, Bristol BS1 4AH
Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
Chancery Exchange, 10 Furnival Street, London EC4A 1AB
Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7685 1266
www.burgess-salmon.com



Burgess Salmon LLP is a Limited Liability Partnership registered in England and Wales (LLP number OC307212) and is regulated by the Solicitors Regulation Authority. A list of members, all of whom are solicitors, may be inspected at our registered office: Narrow Quay House, Narrow Quay, Bristol BS1 4AH.