Original Article

Non-UK employers and PPF protection

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ABSTRACT Scheme entry into the Pension Protection Fund generally requires the employer to have entered a UK insolvency process (unless the employer is an EEA credit institution). In practice, this means that a UK process (for example liquidation) would need to be started. This article looks at the legal issues and the inter-relation with the EC Insolvency Regulation. It queries whether the UK requirement is actually needed and suggests that the legislation be amended.

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The Pension Protection Fund (PPF) was set up by the Pensions Act 2004 with effect from April 2005. As is well known, it is funded by levy payments payable by defined benefit pension schemes that are eligible for entry into PPF.

The structure is that if the employer enters a formal insolvency (liquidation, administration or administrative receivership and so on), then the scheme will normally enter an assessment period (during which benefits are frozen at the PPF compensation level), and the rescue position is checked.

For a ‘scheme rescue’, the employer’s business must either be rescued as a going concern so that it retains its pension liabilities or other persons assume the employer’s pension liability. If a scheme rescue is not possible, then a funding check is carried out to see if the assets of the scheme (including any funding that may be obtainable from the now insolvent employer) will

be sufficient to meet the PPF level of benefits. If not, then the scheme will enter PPF (which will take over all its assets and provide the protected level of benefits). If the assets are sufficient to meet the PPF level, then the scheme will normally wind up outside PPF.

All of this is (relatively) clear. Complications inevitably ensue if there is more than one employer (or there has been more than one employer in the past). There are also difficulties with regard to how money purchase benefits are treated (perhaps thrown into even more confusion following the recent decision of the Court of Appeal in *Houldsworth v Bridge Trustees* (Imperial Home Décor Pension Scheme) [2010] EWCA Civ 179.

However, this piece is designed to make the point about how non-UK companies are dealt with in this insolvency scenario. PPF generally applies to schemes that have their main place of administration registered in the United Kingdom.¹ There is no reason why a company incorporated outside the United Kingdom cannot be an employer in relation to a UK tax registered pension scheme, which is ultimately eligible to enter PPF.

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The key issue here is whether the overseas employer can have an 'insolvency event' occur in relation to it. This is a necessary pre-condition for the scheme to be eligible to enter PPF. The term 'insolvency event' is defined in section 121 of the Pensions Act 2004 and regulation 5 of the PPF (Entry Rules) Regulations 2005 (SI 2005/590). These provisions define an 'insolvency event', in relation to a company, as generally being various forms of insolvency proceedings against the company under the Insolvency Act 1986. For example, the company entering into administration under Schedule B1 of the Insolvency Act 1986 – see section 121(3)(d), Pensions Act 2004.

The statutory list in section 121 of the Pensions Act 2004 and the relevant regulations is definitive – see section 121(6).

If the employer does not enter a formal insolvency, then it seems the scheme cannot enter PPF. Section 129 of the Pensions Act 2004 allows the trustees of a scheme to apply to PPF if they become aware that the employer is unlikely to continue as a going concern. This does not require a formal insolvency of the employer in the United Kingdom, but is only available where the prescribed circumstances in regulation 7 of the PPF Entry Rules apply. This limits the section 129 entry procedure to public bodies, charities and trade unions. These are bodies in relation to which it is not possible for an insolvency event (as defined in section 121) to occur.

This list was extended from 1 April 2009 by the Pension Protection Fund (Miscellaneous Amendments) Regulations 2009 (SI 2009/451) to include an 'EEA credit institution' and an 'EEA insurer'. These are broadly the relevant institutions established in EEA but outside the United Kingdom. The explanatory notes to the amending regulations clarify that this change was made because such institutions cannot enter a UK insolvency proceeding (it is not possible to wind them up under the Insolvency Act 1986).²

Therefore, in practice, this will mean that UK insolvency proceedings will need to be instituted against a non-UK employing company in order to place it in a UK insolvency process, and therefore make the scheme eligible to enter PPF.

A similar requirement for there to be a UK insolvency applies in relation to the claims by employees on the National Insurance Fund under the Employment Rights Act 1996. The need for such a formal insolvency may well be a ground on which to seek a winding up order against such an overseas company – see the decision in *Re Eloc Electro – Optieck and Communicatie BV* [1982] Ch 43. In *Re Compania Merabello San Nicholas SA* [1973] Ch 75, it was held that the prospect of relying upon the Third Parties (Rights Against Insurers) Act 1930 was sufficient reason for winding up a foreign company.

Section 221 of the Insolvency Act 1986 allows unregistered companies to be wound up under that Act. A recent example of a court ordering the winding up of an unincorporated association is the *Construction Confederation* case [2009] EWHC 3551 (Ch), where Judge Purle QC (sitting as a High Court judge) granted a petition by the Confederation Staff Pension Scheme to wind up the Construction Confederation (CC). He commented that there was 'real prospect' that placing CC into liquidation 'will operate as a triggering event enabling access to the Pension Protection Fund'. He held that 'the potential advantage of eligibility for the PPF is itself a reason for exercising the jurisdiction at the suit of the pension fund trustees, who are substantial creditors, and who have established the prospect of such eligibility to the requisite standard'.

But what happens if the overseas incorporated employer has already entered an insolvency process in another EU member state? The EC Regulation on Insolvency Proceedings 2000 (EC 1346/2000) provides that proceedings in another EU member state dealing with insolvency will apply in the United Kingdom. If main proceedings have started in another member state, any insolvency proceedings in the United Kingdom can only take the form of a liquidation – see Article 3(3) of the EC Regulation and the comment in *Re MG Rover Espana SA* [2006] EWHC 3426.

This is unfortunate. A UK liquidation would mean that the company needed (in general) to cease trading, and therefore may be inconsistent with, say, the trading aspirations of the main

insolvency proceedings (for example an administration in the Netherlands). It may perhaps be possible for a UK administration in some circumstances to constitute a secondary 'winding-up proceeding' within the EC Regulation, but this is not clear.³

The point could be resolved if the UK legislation for PPF (and indeed the National Insurance Fund) was amended to recognise overseas insolvencies.

Patten J discussed the issues here in a recent English case, *Re Nortel Networks SA* [2009] EWHC 207. He granted an application by English administrators, for the court to issue letters of request to courts in a number of Member States in EC, asking for them to be told of any application for secondary proceedings to be opened and allow them to make submissions if any such application was made. This was to reinforce that a liquidation proceeding in another member state may not be in the interests of the main proceedings (as it may cause trading to cease).

Therefore, the question arises about whether a UK court would agree to a secondary liquidation, if this was needed. It seems clear that an ancillary benefit for the employee/scheme is enough to found a normal liquidation – *Re Eloc Electro – Optieck* (above).

However, it is clear that the decision of the court of whether to grant a winding up order is discretionary – see section 125, Insolvency Act 1986 and *Re P&J Macrae Ltd* [1961] 1 WLR 229. Normally, a winding up order will follow if a creditor has standing and the company is insolvent, unless there is some reason why it should not. The burden to show a reason against the winding up order is with the company (that is, its main insolvency practitioners). Presumably, the UK court would need to balance:

- the arguments of the overseas insolvency practitioner (to continue to trade and so on); against
- the interests and desires of the UK pension scheme to put the scheme into PPF.

If a secondary winding up proceeding in the United Kingdom is not in the general interest of

the insolvency proceedings, this may be a reason why the court may refuse to make a winding up order or may adjourn the application.

There are examples in Australia of cases where a winding up application has been adjourned where the evidence was that the creditors had a better prospect of payment without it winding up – see, for example, *Re Presha Engineering (Aust) Pty Ltd* (1983) 1 ACLC 675.

It does seem that if the bulk of creditors opposed a winding up petition, this would fall onto the scales in terms of whether a winding order would be granted – see, for example, *Re Leigh Estates* [1994] BCC 292 (a case concerning a Council seeking winding up because it would get a better position on liability for rates).

In one high-profile case, *Re Bank of Credit and Commerce International SA* [1992] BCLC 570, Browne-Wilkinson V-C was prepared to adjourn a winding up petition to see whether a partial rescue of the Bank could be achieved. This was resisted by the Bank of England on various grounds, including that the position of employees could be affected, and so could UK depositors in relation to their protection under the Financial Services Compensation Scheme. Having balanced the position, the judge ultimately granted an adjournment of the winding up petition pending further investigation.

All of this seems to be unnecessary. There seems to be no reason why the Pensions Act 2004 could not recognise the existence of insolvency proceedings outside the United Kingdom where these are generally recognised for insolvency purposes within the United Kingdom. There seems to be no good reason for forcing the UK creditors (employees or pension scheme) to go to the expense of pushing the overseas employer into a formal UK insolvency.

Perhaps this is more convenient for PPF (and the National Insurance Fund) in that they can clearly check whether there is a UK insolvency. It seems unnecessary to require this just for these governmental or public bodies and not (say for other creditors) where the existence of the overseas proceedings should be enough under the EC Regulation.

It is hoped that any change to the PPF Entry Rules could, in the future, usefully deal with this conundrum.

REFERENCES

- 1 Regulation 2(1)(j) of the Pension Protection Fund (Entry Rules) Regulations 2005 (SI 2005/590) excludes a scheme that does not have its main place of administration registered in the United Kingdom.
- 2 See regulation 3(1) of the Credit Institutions (Reorganisation and Winding Up) Regulations 2004 (SI 2004/1045) and regulation 4(1) of the Insurers (Reorganisation and Winding Up) Regulations 2004 (SI 2004/353).
- 3 The term 'winding-up proceeding' is defined in the EC Regulation on Insolvency Proceedings to include a UK 'winding-up through administration'. See also the decision of Blair J that an administration with distributions to creditors could be a winding-up for the purpose of a trust deed – *Re Kaupthing Singer & Friedlander Ltd* (2010) EWHC 316 (Ch).