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# Corporate transactions – are pension scheme trustees deal-breakers?

**Sometimes pensions issues scupper corporate deals. A recent high profile example of this is WHSmith, where trustee intervention led to the withdrawal of a bid by joint venture company Permira to take over the scheme's sponsoring employer. But the role of trustees in this situation is often a tricky one. Here we highlight some considerations.**

### Corporate transactions

**Why trustees are interested**

- Many schemes, like the WHSmith and the Marks & Spencer pension schemes, currently have significant funding deficits.
- Trustees will be concerned about the sponsoring employer's ability to make good the pension deficit.
- Trustees will also be interested in a purchaser's likely approach towards (and ability to fund) post-transaction pension provision.

### Corporate transactions

**Why the purchaser matters**

- Changes in a company's ownership may result in a change in the scheme's sponsoring employer.
- Some purchasers, such as venture capitalists, may be funded primarily by highly geared bank borrowing.
- The purchaser's financial strength may affect pension scheme funding.

### Bank borrowing

**Why this is relevant – Part I**

- The financial backers of a purchaser may require a secured or preferential debt over assets of the target company which sponsors the pension scheme.
- If the sponsoring employer becomes insolvent, the bank heads the queue of creditors who may share in the assets.

### Bank borrowing

**Why this is relevant – Part II**

- Apart from small amounts relating to unpaid contributions and contracting-out benefits, on an insolvency pension liabilities merely rank as unsecured creditors [1].
- Consequently, the greater the sponsoring employer's borrowing, the less money there is likely to be on an insolvency to meet pension deficits.

1 The Government apparently has no current intention to improve this position

## Trustee powers

What can trustees do?

- Like the WHSmith trustees, some trustees may have unilateral power to:
  - set the scheme contribution rate; and/or
  - trigger a scheme wind-up, therefore making any debt on the employer immediately payable on an expensive buy-out basis.
- Such powers may be on-going or triggered by certain circumstances, e.g. a hostile takeover bid.

## Trustee powers

Improving funding

- Not all trustees will be armed with such potent powers as those outlined above.
- But those that are have scope to influence the amount of money an employer may have to pay into a scheme, and how soon.
- Such powers could even be used as leverage to gain preferential status for pension scheme liabilities – although commercially this may be unrealistic.

## Conclusions

- Trustees can now be expected to assess the impact of corporate deals on their pension schemes and, if they have powers, to use them to protect beneficiaries.
- Trustees who find themselves in the unenviable position of potential deal-breaker need to:
  - know what steps they can take to protect members' best financial interests;
  - be alive to possible conflicts of interest, both personal and in terms of their relationship with the sponsoring employer;
  - seek advice.

This edition of Sackers Extra News was written by partner Chris Close and solicitor Helen Ball to provide information about relevant pensions issues in the area of corporate transactions. If you would like further information please contact:

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