

news

Trustee Conflicts – An Everyday Story of Superheroes?

Acting as a trustee can no doubt sometimes seem like a herculean task. Combining such a role with being a Finance Director (FD) of the sponsoring employer needs the powers of a superhero (“Superannuation Man”?!). Just how can such potentially demanding, and diverse, roles be managed in times of conflict?

Blast off!

- For over 100 years it has been settled law that trustees should not put themselves in a position where a conflict arises.¹
- But since 1996², pension scheme trustees have been able to act even where their duties and interests as members conflict.
- The focus has now shifted to so-called duty/duty conflicts.

Superannuation Man

- The classic example of a duty/duty conflict is the FD who is a trustee and owes dual duties to both the company and trustee boards.
- In addition to their existing trust law duties, a new general duty for company directors to avoid conflicts of interest will be introduced by the Companies Act 2006.³
- In light of this, how can the valuable input of the key company directors, such as the FD, be retained on the trustee board?

X-Ray Vision

- The first step to managing conflicts is to scrutinise the likelihood of them arising by conducting an audit.
- In July 2007, the Pensions Regulator’s Governance Survey reported that approximately 60% of defined benefit schemes have a means of identifying and recording conflicts of interest, and that over a third have a written policy in place.
- An escape route needs to be found only where there is a real (or potential) conflict.

¹ *Bray v Ford* [1896] AC 44

² Pensions Act 1995, section 39

³ See our Sackers Extra News: “Companies Act 2006 – What Lies Beneath?” dated October 2007

Possible escape routes

Part 1 - Release

- Release by consent of the beneficiaries is an impractical solution in a pension scheme as it would require obtaining consent from all scheme members. But specific consent from the company for the FD to act may be feasible.
- Another option is to amend scheme rules to include authorisation for a trustee to act even in a conflict situation.
- However, a trustee under an actual conflict must still properly discharge his duties to the members (for example, it may be difficult for the FD to be party to negotiations on the contribution rate).

Possible escape routes

Part 2 - Flying out of trouble

- Resignation takes the trustee out of the conflict arena.
- Although anecdotal evidence exists of a reduction in FD representation on trustee boards, the Pensions Regulator reports that only 9% of trustees have taken this route where there has been an actual conflict.⁴
- A less draconian option is the delegation of the relevant decision to a sub-committee (minus the FD).

Confidential Information

Deadly Kryptonite!

- The general rule is that any confidential information received by a trustee must be shared with co-trustees. Delegation does not alter this duty.
- With this background in mind, increasingly trustees are asked to sign confidentiality agreements.

See into the Future

- The higher levels of duty imposed on trustees by the new scheme governance and trustee knowledge and understanding requirements have upped the ante on conflicts.
- The Pensions Regulator has until now focused on conflicts in discrete areas, such as scheme funding, but we understand further specific guidance on conflicts will be issued shortly.
- A combination of management methods for conflicts (with timely advice) is likely to satisfy these legal and regulatory requirements.

⁴ The Pensions Regulator's Governance Survey