

# Securing Members' Benefits on Winding-Up

David Main  
A&L Goodbody  
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## **Some legal issues in winding-up**

- Date winding-up starts
- "Resources" of the scheme
- Ascertaining the liabilities
- Securing the liabilities
- Demanding further contributions
- Investment during winding-up

## **When does winding-up start?**

- An important date
- Should be clear from winding-up rule
- Rules might not be on all fours
- Re H Williams Pension Fund

## Resources of the scheme - 1

- Section 59(1)(e): trustee to apply the resources of the scheme to discharge scheme liabilities without undue delay in accordance with the rules and Section 48
- Section 48(1): applying the resources of the scheme to discharge scheme liabilities for benefits in statutory order of priority

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## Resources of the scheme – 2

- “Resources” funds out of which scheme benefits are payable
- Includes assets, unpaid contributions, claims, insurance policy proceeds, annuity contracts etc

## Resources of the scheme - 3

- Excludes third party debts/expenses?
- Section 48(4) mentions winding-up expenses
- Section 59 liabilities under rules and under section 48
- Trustee lien / indemnity for expenses
- No case law but resources probably net of properly incurred third party debts / expenses

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## **Ascertaining the liabilities**

- Pensioners / deferreds not an issue
- Actives can be problematic – anything in priority dealing with break in linkage
- Preservation vs greater entitlement under rules
- Less than 2 years' qualifying service?

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## **Securing the liabilities - 1**

- Keep DB entitlement - deferred annuity or DB scheme service credit
- Convert to DC entitlement - buy-out bond, PRSA, DC credit in another scheme



## Securing the liabilities - 2

- Rules may permit / require purchase of deferred annuities for actives and/or deferreds
- Section 48(3): trustees may discharge, notwithstanding the rules and without member consent, by transfer to another funded scheme or a buy-out bond

## Securing the liabilities - 3

- Section 48(3) “not less than the actuarial value of the benefits payable on the winding-up under the rules”
- “Actuarial value” is the equivalent cash value
- Actuary must advise on minimum transfer values

## Securing the liabilities – 4

- What if funding level is between funding standard and deferred annuity levels?
- Seek quotes and actuarial guidance
- Decide on alternative transfer value basis e.g. STV + 20%?
- Rules, general trustee duties and Ombudsman's view

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## **Demanding further contributions - 1**

- No statutory debt on the employer but might be a notice period
- Analyse contribution rule
- Pinsent Curtis case - may be able to demand buy-out cost

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## **Demanding further contributions - 2**

- Should trustees demand buy-out contributions?
- Range of reasonable responses
- Actives' and employer's interests might converge
- Employer insolvency / parent company's role
- Actives' agreement / future pension provision
- Actives close to NRA and deferreds

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## Investment - 1

- Rule usually requires trustees to “realise” fund
- Long-term nature of scheme has gone versus delays in winding-up

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## Investment – 2

- Trustee duties remain the same but probably duty to preserve capital
- Strategy likely to depend on how trustees intend to secure liabilities
- Not much law on the issue but a practical problem

## Other issues – 1

- Who pays winding-up expenses?
- List of priorities
- Expenses rule
- Include in demand for additional contributions?



## Other issues - 2

- Amendment - power may not survive winding-up unless reserved
- Amend before winding-up e.g. transfer-out, leaving service, calculation of actives' benefits on winding up
- Amendment power is a fiduciary power – “no cheating” of members

## Other issues - 3

- Surplus funds once statutory priorities have been secured
- Need to check augmentation provisions
- Employer consent may / may not be fiduciary power
- Employer may be a beneficiary

## Conclusions

- Check **all** relevant provisions of the trust deed and rules (not just winding-up rule)
- Act quickly – contribution demand, investment strategy, calculation of resources / liabilities and what resources will buy
- Balancing interests – band of reasonable responses