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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND & WALES
BUSINESS LIST (ChD)
[2019] EWHC 1222 (Ch)



No. HC-2017-002366

Rolls Building
Fetter Lane
London EC4A 1NL

Wednesday, 27 March 2019

Before:

MR JUSTICE FANCOURT

B E T W E E N :

PS INDEPENDENT TRUSTEES LIMITED and Another

Claimants

- and -

CHINA SHIPPING (UK) AGENCY CO. LTD. and Another

Defendants

MR N. HILL (instructed by CMS) appeared on behalf of the Claimants.

MR S. ATKINSON (instructed by PwC) appeared on behalf of the Defendants.

J U D G M E N T

MR JUSTICE FANOURT:

- 1 The issue in this case is whether, upon the insolvency of Johnson Stevens Agencies Limited (“JSA”) on 18 May 2011, the Johnson Stevens Agencies Limited Pension and Death Benefit Scheme (“the Scheme”) became a segregated scheme to whose deficit only JSA was liable to contribute, or whether the Scheme remained a non-segregated pension scheme to whose deficit the other two solvent participating employers, the defendants, are liable to contribute.
- 2 The claimants are the trustees of the Scheme. It is a “defined benefit occupational pension scheme” governed by a definitive Trust Deed and Rules made on 2 October 2001. There were before the insolvency of JSA three participating employers: JSA and the two defendants. The Scheme was, therefore, a multi-employer scheme within the meaning of s.75A of the Pensions Act 1995. JSA went into administration on 18 May 2011 and sold its business and assets on the same day. It is common ground that thereupon, pursuant to clause 18 of the Trust Deed and Rules, the Scheme as a whole was determined and wound up.
- 3 Under section 75 of the 1995 Act, as it applies to a single employer scheme, a winding up triggers a liability of the employer in debt for an amount equal to the difference at a time designated by the trustees or managers of the scheme between the value of the assets and the value of the liabilities. Section 75 and Regulation 5 of the Occupational Pension Schemes (Employer Debt) Regulations 2005 (“The Employer Debt Regulations”) make provision for how the debt is to be calculated. Section 75A of the 1995 Act provides that regulations may modify section 75 as it applies to multi-employer schemes. These modifications are also made by the Employer Debt Regulations. Regulation 6 of those Regulations makes each employer liable to contribute to its share of the deficit.
- 4 The defendants’ case is that Part 7 of the Pension Protection Fund (Multi-Employer Schemes) (Modification) Regulations 2005 (“the Multi-Employer Regulations”) segregated parts of the Scheme relating to members who are or were employees of the defendants, with the consequence that JSA’s part was also segregated. The Scheme, therefore, became a segregated scheme within the meaning of Regulation 8 of the Employer Debt Regulations. JSA’s part of the Scheme then falls to be treated as a separate scheme and so only JSA is liable to pay the deficit assessed by reference to that separate scheme.
- 5 The claimants’ case is that Regulation 6 of the Employer Debt Regulations applies to make the defendants liable for their share of the deficit of the whole Scheme, because the Scheme did not become a segregated scheme within the meaning of Regulation 8.
- 6 The liability or otherwise of the defendants turns only on the construction of the relevant statutory provisions and the meaning of the terms of the Trust Deed and Rules; there is no factual dispute. In those circumstances, it was sensibly agreed that the claimants’ application for summary judgment should be treated as a final trial of the issues of law that divide the parties rather than a decision on whether or not the defendants’ case has a real prospect of success.

The Terms of the Scheme

- 7 Turning to the relevant provisions of the Trust Deed and Rules, clause 18 of Part 2 provides that the Scheme is to be wound up in accordance with clauses 19 and 20 upon the happening of any of the following events, whichever shall first occur, and the third of the events is the making of an order or the passing of an effective resolution for the winding up of the principal employer or the principal employer ceasing to carry on business. The “principal employer”, as defined, is JSA.
- 8 It is common ground that JSA ceased to carry on business on 18 May 2011. Clause 18 is, however, subject to a proviso that, in certain circumstances, including the principal employer ceasing to carry on business, the trustees have a discretion to defer winding up.
- 9 Clause 21(a) of the Deed provides, so far as material, “If before such determination of the Scheme, as referred to in clause 19 hereof”, and there follow four alternatives, the third of which is “an order is made or an effective resolution is passed for the winding-up of an associated employer or an associated employer ceases to carry on business”, and it then continues “then upon the happening of whichever of the events described in the preceding subparagraphs of this clause shall first occur, the participation of such associated employer in the scheme shall cease and the provisions of sub-clause (b) of this clause shall apply.”
- 10 Clause 21(b) provides, in substance, that, in those circumstances, the Scheme is wound up so far as regards members and other beneficiaries whose benefits derive from employment with the associated employer. Clause 21(c) provides that, unless the trustees elect to secure the benefits by other means under clause 21(d), assets are to be ascertained and allocated to the partial winding-up, subject to a discretion for the trustees to defer that ascertainment and allocation. An associated employer, for the purposes of clause 21, is any employer (other than the principal employer and the trustees) who is a party to the Trust Deed and Rules or who later becomes a party to the Scheme.
- 11 It is common ground that none of the events in clause 21 took place before the Scheme as a whole was wound up pursuant to clause 18. It is clear - and it is accepted by the defendants - that clause 21 does not permit a partial winding up as regards those members who are interested in the Scheme by reason of employment by JSA. It only applies in the case of associated employers.

The Statutory Provisions

- 12 I turn to the relevant statutory provisions. There is appended to this judgment the full text of the relevant statutory provisions to which I now refer, some of which defy any brief summary.
- 13 Section 75 of the 1995 Act provides for payment by the employer for any deficiency in the assets of the pension scheme. Sub-section (2) provides as follows:

“If

- (a) at any time which falls when a scheme is being wound up but before any relevant date in relation to the employer which occurs while the scheme is being wound up, the value of the assets of the scheme is less than the amount at that time of the liabilities of the scheme; and
- (b) the trustees or managers of the scheme designate that time for the purposes of this subsection

an amount equal to the difference shall be treated as a debt due from the employer to the trustees or managers of the scheme”.

- 14 Different provision is made by subsection (4) of that section where a relevant event occurs. Subsection (5) then provides that

“for the purposes of subsection (2) and subsection (4), the liabilities and assets to be taken into account and their amount or value must be determined calculated and verified by a prescribed person and in the prescribed manner.”

The manner is prescribed by Regulation 5 of the Employer Debt Regulations.

- 15 Section 75A of the Act provides as follows, so far as material,

“(1) Regulations may modify section 75, as it applies in relation to a multi-employer scheme;

(2) The Regulations may in particular provide for the circumstances in which a debt is to be treated as due under section 75 from an employer in relation to a multi-employer scheme.”

- 16 The Regulation is Regulation 6 of the Employer Debt Regulations. Regulations 8(1) and 8(2) of those same Regulations are important but difficult to summarise and I shall not read out the text now.

- 17 Part 2 of the Pensions Act 2004 establishes the Pension Protection Fund (“PPF”). That is described by Mr Hill, who appears for the claimants, as a lifeboat for an occupational pension scheme where the employer becomes insolvent. Where it applies, it secures to members of the scheme the large majority but not all of their accrued benefits. Section 120 in Chapter 2 of Part 2 of the 2004 Act provides for the insolvency practitioner of the insolvent employer to notify the PPF Board and others of the insolvency and then to notify them whether or not a pension scheme rescue is possible. If a negative notification is made, the Board must then issue a determination notice following an assessment of the scheme. The Board must accept responsibility for an eligible scheme where there is a shortfall of assets. All these statutory provisions are drafted on the assumption that the scheme has a sponsoring employer. The Multi-Employer Regulations make provision as to how Part 2 of that Act applies in the case of a multi-employer scheme. Their purpose is, therefore, to define the circumstances in which such a scheme will either in whole or in part be able to clamber aboard the PPF lifeboat. As the explanatory memorandum to the Regulations states, they modify the Act so that they can be applied in the most appropriate way to a multi-employer scheme or to sections of such a scheme.

- 18 Parts 5, 6 and 7 of the Multi-Employer Regulations apply to non-segregated schemes and Parts 2 to 4 apply to segregated schemes. A “segregated scheme” is defined for the purposes of those Regulations as meaning a multi-employer scheme which is divided into two or more sections, where (a) any contributions payable to the scheme by an employer in relation to the scheme or by a member are allocated to that employer’s or that member’s section and (b) a specified proportion of the assets of the scheme is attributable to each section of the scheme and cannot be used for the purposes of any other section. As established by the Trust Deed and Rules, the Scheme is a non-segregated scheme.

- 19 Part 5 of the Regulations is headed “Non-Segregated Schemes: Schemes with a Requirement for Partial Wind Up on the Withdrawal of a Participating Employer”. Regulation 45 makes detailed provision for the segregation of part of a scheme. In Part 5, it is clear that a segregated part is a part only of a non-segregated scheme and it is the part that is then taken to be the scheme as referred to in Part 2 of the 2004 Act. The rest of Part 5 of the Regulations then amends Part 2 of the 2004 Act so that its provisions apply to a segregated part of a non-segregated pension scheme.
- 20 Part 7 of the Regulations is headed “Non-Segregated Scheme with an Option to Segregate on the Withdrawal of a Participating Employer”. Regulation 71 makes similar provision to Regulation 45, where there is an option for trustees to segregate part of a scheme where an employer has ceased to participate in it. The trustees are deemed to exercise that option unless and until they decide not to exercise it. Again, it is clearly intended to create a segregated part of a non-segregated scheme.

The Facts

- 21 The relevant facts in this case are not in dispute and can be stated very shortly. First, the designated date, designated by the trustees for the purposes of section 75 of the 1995 Act, was 31 March 2016. The total deficit at that time appears to have been £11,501,200. Second, the claimants conducted the actuarial assessment of the deficit relating to the individual employers pursuant to Regulation 6 of the Employer Debt Regulations. The calculation in the case of the first defendant was a figure of £5,462,400 and in the case of the second defendant it was £899,100. There is no dispute about the quantum of the debt, if Regulation 8 of the Employer Debt Regulations does not apply and Regulation 6 of those Regulations does apply.

The Arguments

- 22 The claimants’ argument is succinct and straightforward. They argue that for three reasons Regulation 6 of the Employer Debt Regulations applies and Regulation 8 does not and that, accordingly, the defendants are liable as claimed.
- 23 The three reasons, in summary, are the following. First, Regulation 71 of the Multi-Employer Regulations cannot apply upon the insolvency of JSA to create a segregated part of the Scheme. Second, and alternatively, Regulation 71 only applies where an option to segregate part of a scheme exists in relation to the employer that has become insolvent and it does not apply where, as here, company A becomes insolvent and an option exists in relation to company B. Third, and in the further alternative, even if Regulation 71 does apply, it can only create a segregated part of a non-segregated scheme and cannot bring about a segregated scheme within the meaning of Regulation 8 of the Employer Debt Regulations.
- 24 So far as the first argument is concerned, the claimants contend that the circumstances specified in Regulation 71(1) of the Multi-Employer Regulations did not exist at the relevant time when JSA became insolvent. There is and was no option under clause 21 of the Trust Deed and Rules at that time to wind up part of the Scheme because such an option could only be exercised before the determination of the whole Scheme under clauses 18 to 20. Upon JSA becoming insolvent, the Scheme was wound up as a whole and at that exact

moment the option under clause 21 ceased to be exercisable. Accordingly, they say, the two pre-conditions in Regulation 71(1)(a) and (b) cannot both have been satisfied.

- 25 The defendants' response to that is that Regulation 71(1)(b) is not concerned with the question whether an option existed at any particular time or in particular circumstances, but whether the Scheme Rules provide for such an option. The Scheme Rules do so, they say, at clause 21 in relation to associated employers. Although, once the whole Scheme has been wound up, that option could not be exercised, the pre-condition in Regulation 71(1)(b) is nonetheless satisfied.
- 26 The defendants also contend that the claimants cannot argue that the option could never be exercised in the event of insolvency of the principal employer, because clause 18 of the Trust Deed and Rules gives the trustees the discretion to defer winding up so that clause 21 could still, at least theoretically, apply.

Analysis

- 27 It is, perhaps, a little artificial to attempt to deal with this first issue separately from the second issue and the argument relied on by the claimants. However, it seems to me that the defendants may well be right on the first issue. Regulation 71(1) contains two pre-conditions: insolvency and the existence of an option. The option must be one that is exercisable upon the insolvency of the employer. If the option could not be exercised in those circumstances or, for example, had lapsed by that time, a deemed exercise of the option would make no sense and would be contrary to the Scheme Rules. In those circumstances, the claimants would be right in saying that there is no option that can be exercised. But, if the option could be exercised upon the insolvency of the employer, the defendants are probably right. The relevant time must be when the insolvency event occurs, for the deemed exercise of the option is automatic if the option then exists. At the time of the insolvency event, it could be unclear whether the trustees would exercise their discretion to defer the winding-up of the scheme and so it would still be possible for the option to take effect, if winding up were deferred. Despite the apparently imperative terms of the first sentence of clause 18, it is therefore possible that the option could be exercised.
- 28 However, the problem for the defendants' case seems to me to be the second argument of the claimants. There must have been intended to be a connection between the insolvency of the employer and the exercise of the option. It is difficult to see how the draftsman of the Regulations can have meant that an option to segregate in relation to employer B should be deemed to have been exercised upon the insolvency of employer A. The evident purpose of Part 7 of the Multi-Employer Regulations, as with Part 5 of those Regulations, is to make the PPF lifeboat available in cases where one employer in a multi-employer pension scheme becomes insolvent. But that only happens if the Scheme requires a segregation upon an employer ceasing to be a participating employer or contains an option for such segregation. It does not happen if the Scheme does not contain such a provision.
- 29 The amendments made to Part 2 of the 2004 Act only make sense if there is a segregation of the assets and liabilities relating to the insolvent employer, not those relating to another solvent employer. It is the insolvency practitioner of the insolvent employer who must take steps under Part 2 of the 2004 Act to trigger the involvement of the PPF Board.

- 30 The defendants, represented by Mr Atkinson, nevertheless advance the following contrary arguments.
- 31 First, at a linguistic level, they say that Regulation 71(1)(b) uses the words “an employer” not “that employer” or “the employer referred to in (a) above”, which, Mr Atkinson says, would have been used if that was what was meant. Second, they say that it makes no difference that clause 21 of the Trust Deed and Rules applies only in the case of the associated employers, because, literally, this satisfies the requirement in Regulation 71(1)(b). Third, they submit that the facts of this case demonstrate that it is not necessary to read Regulation 71(1)(b) as referring to the same employer as in Regulation 71(1)(a) because clause 21 has the deemed effect of segregating the Scheme into three parts, including one part in respect of JSA. That is because clause 21 provides an option in relation to both defendants that satisfies Regulation 71(1)(b) and there is, therefore, segregation of a part for each defendant and, necessarily, a third part relating to JSA. That, he submits, is consistent with the amendments made by Part 7 of the Regulations to the 2004 Act and, to the extent that these amendments would also require an insolvency practitioner of the defendants to notify the PPF Board of insolvency, that clearly cannot be done and so the requirement can be disregarded.
- 32 I am unable to agree with those arguments for the following reasons.
- 33 First, there is no deemed segregation where scheme rules do not provide for segregation upon an employer ceasing to participate in a scheme. Part 6 of the Multi-Employer Regulations would apply in those circumstances and the PPF lifeboat is then not available while a solvent employer is participating in a scheme. It is not the case, therefore, that segregation takes place wherever there is insolvency of a participating employer in a non-segregated pension scheme. It only takes place where the Scheme Rules make provision for the segregation of assets and liabilities upon an employer ceasing to participate. Thus, the Multi-Employer Regulations seek to give effect to the terms of scheme rules. They do not operate contrary to the scheme rules. It would be surprising if the Regulations had the effect of providing for segregation in relation to JSA in deemed exercise of a power that does not exist.
- 34 Second, the deemed segregation of part under the Multi-Employer Regulations is a segregation of part of a non-segregated scheme. The effect of Parts 5 and 7 of the Regulations is not to convert a non-segregated scheme into a segregated scheme. It is to segregate only a part of the scheme. The modifications to section 120 of the 2004 Act made by Regulations 46(1) and 71(3) make that clear (see, in particular, the definitions in Regulation 45(3) as they apply to Part 5 and the amendments made to Part 2 of the 2004 Act by Regulation 46(1)(a), 2(a), 3 and 4 and Regulation 71(3)). From these amendments, it is quite clear that the part to be segregated is the assets and liabilities that relate to the insolvent employer. That is because Part 2 of the 2004 Act, as varied, then applies to that part of the Scheme to enable it to qualify for PPF support as if it were a separate scheme with a single insolvent employer.
- 35 Third, the defendants’ argument that the purpose of the Regulations is satisfied because there is segregation of assets and liabilities of JSA is merely fortuitous. Its assets and liabilities are only segregated because there are two other participating employers, both of which are subject to the option in clause 21 and whose own assets and liabilities are segregated according to the defendants’ construction of Regulation 71. In effect, therefore, the Regulations create something akin to a segregated pension scheme, though neither the

Regulations nor the Scheme Rules make provision for such a scheme. On the defendants' case, if there were 50 solvent associated employers, instead of two, the effect would be the same and there would then be 51 segregated parts of the Scheme only one of which related to an insolvent employer. The other 50 segregated parts would be needlessly created. But, if there were two principal employers and 50 associated employers or any one employer who was not subject to the option, there would be no segregation of the assets and liabilities of the one insolvent company. It is very surprising if the availability of the PPF lifeboat for one insolvent employer can depend on which other solvent employers are subject to a partial winding-up provision.

- 36 Fourth, the reason why Regulation 71(1)(b) uses the indefinite article “an employer” rather than “that employer is probably that, as the defendants argued, it is describing general provisions of the Scheme Rules providing for a partial winding up, not referring to particular circumstances that exist at a relevant time. The paradigm case that the draftsman may well have had in mind is a provision for partial winding up that applies to any participating employer rather than one that applies only to certain participating employers. He may have avoided using “that” instead of “an” in case such language were taken to imply that the scheme rule had to make provision specifically for the insolvent employer rather than a general and non-specific provision. But, regardless of that, it is, nonetheless, clear from the context, including the wording of Regulation 71(3)(a)(i) and (c)(i), which modify the wording of sections 120 and 129 of the 2004 Act, that it is the insolvent employer to which the option in the Scheme Rules must apply. The employer referred to in Regulation 71(1)(a) must, in my judgment, be within the scope of the option referred to in Regulation 71(1)(b).
- 37 Fifthly, Regulation 45(2) of the Multi-Employer Regulations, which applies where scheme rules require a segregation of assets and liabilities where an employer ceases to participate in the scheme, expressly states that the segregation requirement is deemed to have been triggered in relation to the employer who has become insolvent. Regulation 71 applies where, instead of segregation being required, the trustees have an option to segregate. It is, in my judgment, impossible to find a reason why Regulation 71 should have a different effect in this regard from Regulation 45. That conclusion is underscored by the fact that Regulation 71(2)(b) provides that,

“except as otherwise provided for in paragraph 3 below, Part 2 of the Act shall be read in relation to the scheme as if it contained the modifications provided for in Part 5 of these Regulations”

The draftsman is treating the two situations as essentially the same, subject only to linguistic and other differences that follow from the fact that there is an option in one case and a mandatory requirement in another.

- 38 Sixth, the modifications of Part 2 of the 2004 Act made by Part 5 of the Multi-Employer Regulations include the interpretative modifications specified in Regulation 45(4)(b), so that “the scheme” is read as being the segregated part of the scheme and references to the “employer” are taken as references to the employer in relation to the segregated part. That means that, among other matters, it is the insolvency practitioner for the employer in relation to the segregated part who must notify of insolvency and confirm whether or not scheme rescue is possible. That cannot be done by an employer who is not insolvent, as would be the case with the defendant companies if their argument is right.

- 39 Mr Atkinson’s arguments that those requirements can simply be treated as not applying because they cannot be performed is not a satisfactory explanation of why the draftsman of the Regulations applied them inappropriately in the case of a Part 7 segregation in the same way as they apply in the case of a Part 5 segregation. The draftsman made specific changes in Part 7 to the changes otherwise made by Part 5 (see Regulation 71(3)). The obvious explanation is that these provisions do, indeed, apply in the same way in which they apply under Part 5; that is to say to the employer who has become insolvent or will not continue in business as a going concern and not to other employee companies that are continuing in business.
- 40 For all of these reasons, Regulation 71 of the Multi-Employer Regulations does not apply, because there is no option under the Rules of the Scheme for the trustees to segregate part of the assets for JSA. The Scheme Rules provide, instead, for the whole Scheme to be wound up on insolvency of JSA, which is what has happened. That is inconsistent with the segregation of the Scheme for which the defendants contend. That being so, there is no part of a segregated scheme to which Regulation 8 of the Employer Debt Regulations can apply and the claimants, accordingly, succeed on their claim based on Regulation 6.
- 41 In those circumstances, I shall address briefly the third argument of the claimants in case what I have said so far is wrong. Even if the defendants were right that Regulation 71 applies so as to segregate assets to each of the three employers under the Scheme, Regulation 8 of the Employer Debt Regulations can only apply if the JSA part of the Scheme is a section of a segregated scheme. “Segregated scheme” is defined for the purposes of Regulation 8 by Regulation 8(2). It requires a scheme to be divided into two or more sections where contributions payable are allocated to a particular employer’s section and a specified proportion of assets is attributable to each section of the scheme and the assets are ring fenced. Regulation 71 of the Multi-Employer Regulations, even if it applies, does not purport to create any such scheme. Its terms make clear that what it creates is a segregated part of a non-segregated scheme.
- 42 To this the defendants have two answers. First, the words “section” and “part” are interchangeable for the purposes of Regulation 8, so that the fact that Regulation 71 creates a segregated part does not prevent Regulation 8 from applying where there are segregated parts of a multi-employer scheme. In that regard, attention is drawn to Regulation 8(1), which refers to the following sections or parts of a scheme, and which says that section 75 of the 1995 Act applies as if the section or part were a separate scheme. There then follows a list of four different kinds of section of a segregated scheme, but nothing described as a part, so it appears that a section of a segregated scheme may also be a part of it and vice-versa within the meaning of Regulation 8.
- 43 Second, it is said that the effect of clause 21 of the Trust Deed and Rules and Regulation 71 is to create three separate segregated parts of the Scheme, one for each employer, and so, in practice, the Scheme is a segregated scheme comprising three parts or sections, whatever Regulation 71 may intend.
- 44 Although there is some force in the submission that what may be described as a part of a segregated scheme may also be described as a section of it within the meaning of the Regulation, the real question seems to me to be whether what was once undeniably a non-segregated scheme can be converted into a segregated scheme within the defined meaning in Regulation 8 by the operation of Regulation 71 of the Multi-Employer Regulations and, if so, whether that can be the effect in this case when the whole of the Scheme is and has since

18 May 2011 been in winding up. If the defendants are right that, despite its terms, Regulation 71 can apply and have the effect of creating three separate parts of the Scheme, the claimants argue that the definition of “segregated scheme” is still not satisfied because the definition requires the scheme to be in accrual and not in winding up. The effect of the insolvency of JSA is that the Scheme as a whole is being wound up under clauses 18 to 20 of the Trust Deed and Rules. There are, therefore, at the time of the deemed exercise of the option no further contributions payable. The claimants say that the Scheme, therefore, cannot be described as one where any contributions payable are allocated to an employer’s section of it.

- 45 In my judgment, that argument is sound. If the defendants are right about Regulation 71, the Scheme has been segregated into three parts each of which is being wound up. The effect of Regulation 71, if it applies at all in the circumstances is therefore, not to create a segregated scheme within the meaning of Regulation 8 but to create three segregated parts of a scheme for the purposes of its winding up. There is no segregated scheme, because neither the Rules of the Scheme nor Regulation 71 provide for the operation of the Scheme as a segregated scheme and the Scheme cannot operate as such.
- 46 Accordingly, in my judgment, Regulation 8 of the Employer Debt Regulations does not apply to the Scheme even if Regulation 71 of the Multi-Employer Regulations does apply. For that reason, too, Regulation 6 of the Employer Debt Regulations applies and the defendants are liable in the sums claimed by the claimants.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge

