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The Maxwell effect

Jane Marshall looks at the lasting impact of the Maxwell pensions scandal, 30 years on from his death

After Robert Maxwell died in mysterious circumstances 30 years ago, £400 million was discovered to be missing from pension schemes in the Maxwell corporate group. The revelation prompted a shockwave of concern about pensions security. Public and politicians demanded that something was done. It was inevitable that there would be an official DTI investigation.

When the report was eventually published it held Robert Maxwell primarily responsible. A strong personality with a reputation for bullying, he exerted as much control as he could over group companies and pension schemes alike – the take of an insider quoted in the report was that "RM will control pensions until he dies". He operated on a 'need to know' basis, opposing disclosure of his business affairs as a matter of principle. The corporate group structure was complex, and the use of a nominee company for making investments obscured the identity of the beneficial owner.

The pension funds were used as a piggy bank to support Maxwell's private business interests. Schemes took risks and provided support on terms that commercial lenders would have refused to accept. Soft cash loans were made to Maxwell's private companies and pension assets used as collateral for unsecured loans which benefited the private companies. Other dealings were made for the benefit of the employer.

The government established a review into the law of pension schemes, chaired by Professor Roy Goode. Evidence was gathered from a wide range of respondents. The Goode Report concluded that trust law (with appropriate legislative clarification in some areas) remained a suitable basis for regulating pension schemes. No major changes were needed. The government accepted the recommendations and in due course introduced the Pensions Act 1995.

Evidence to the Goode Report had included many suggestions about how pensions security could be enhanced, and some of those ultimately found their way into the new legislation. An industry regulator was introduced for the first time. Civil and criminal penalties could be imposed on trustees and

advisers, whose respective roles were clarified and enhanced. Controls were introduced on funding levels. Existing statutory provisions on investment were consolidated and updated and new duties imposed. Member-nominated trustees became mandatory with certain exceptions. Unsuitable persons could be disqualified from acting as a trustee. And a new obligation was imposed on actuaries and auditors to 'blow the whistle' if they had reasonable cause for concern about the operation of the pension scheme.

At the time, the Pensions Act changes were widely considered to be measured and proportionate, but although many of the changes were useful in themselves, they were not directly relevant to the issues that led to the misuse of the Mirror pension funds.

The schemes were not underfunded – discussions had taken place about the use of the surplus. And while there was now power to stop unsuitable persons from acting as pension trustees, Maxwell would doubtless have mounted a robust legal challenge if any attempt had been made to stop him from doing so. The report noted, with an air of frustration, that regulators cannot act without hard evidence which will withstand scrutiny in court. Member-nominated trustees would have been in no better position than others to understand opaque investment dealings. Transactions were concealed from trustees and their true purpose obscured.

Would the Pensions Act changes have prevented Maxwell's misuse of pensions assets and the hardship of members which resulted? They would certainly have made it more difficult. Self-investment above prescribed limits had already been prohibited, but greater transparency emerged as a result of the legislation. Trustees, reminded of their responsibilities, would almost certainly have insisted on more frequent meetings. (Only five full meetings of the MGN scheme trustees had taken place between 1988 and 1991). The focus on the role of advisers, and in particular their whistle blowing obligation, would have probably caused them to consider more closely the way in which the schemes were being run and invested, and whether appropriate disclosures were being made.

But if someone is determined to do wrong, they will ignore or find ways round any law and regulation. There have, after all, been laws against murder and theft for as long as anyone can remember but all go on with distressing regularity. A gulf remains between public expectations of what the law and regulation can achieve and the reality.

What then has been the Maxwell effect on pensions governance 30 years on? The principal outcome has been an unstoppable drive towards member protection. Scheme members are better protected than ever before against underfunding, adverse corporate activity and governance failings. In retrospect the Pensions Act 1995 was only the first step in the process, although conceived and seen at the time as a balanced long-term response to the Goode Report's findings. Since then, pensions law and regulation have increased in volume and complexity and a much tougher pensions regulator with greatly enhanced powers has emerged. The 1995 Act was conceived as evolutionary rather than revolutionary and designed to build on the trust law framework which had gone before. However, it proved impossible to withstand the clamour for more legislation and stronger regulation in the face of corporate insolvencies and restructurings widely perceived to subordinate the interests of scheme members to financial considerations. That there might be two sides to the story, or that things sometimes aren't that simple, is often lost in public debate.

There have been less obvious effects on pensions governance. Paradoxically, reforms that focus on the trustees' central role in scheme decision making have created a risk environment that on occasions appears to discourage independent thought. Greater perceived risk and complexity means that it is increasingly difficult to persuade members and those most closely connected with the company to take on the trusteeship of their pension fund. This has led in turn to an increasing trend for schemes to appoint sole professional trustees- the best solution for some schemes, but by no means all.

The final Maxwell effect is the difference in the pensions landscape then and now. Then the scene was dominated by final salary provision, often on a self-administered basis. Now, few final salary schemes remain open in the private sector; DB active membership is now largely the preserve of the public sector. Complaints about the cost and complexity of the regulation that began in 1995 and which gathered speed over subsequent years are sometimes overstated. However, the combination of increased regulatory cost and risk over the past 30 years has undoubtedly been one of several factors persuading many private sector employers to move from defined benefit provision. The Pension Schemes Act 2021, which came into force on 1 October 2021, is the latest link in the chain of legislation that began after Maxwell. It introduces tougher regulatory powers and sanctions, including new criminal offences, and brings a wider range of corporate activity under regulatory scrutiny. Lawyers will have a field day. Employers will draw their own conclusions.

While all regulation in some way penalises or inconveniences the majority in order to try and prevent the wrongdoing of the minority, it may also have unforeseen consequences. There is nothing new under the sun.

This is an edited extract of a longer article, available on the PAT website.

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