



Intervening for members

✓ **The Pensions Regulator (TPR) director of enforcement, Erica Carroll, speaks to Jack Gray about the regulator's use of anti-avoidance powers after the Silentnight Group's DB pension scheme was severed from its sponsoring employers' business by a pre-pack administration**

➤ **Can you please give some background on the Silentnight case and explain why enforcement action from TPR was necessary?**

We opened our investigation into the possible use of our contribution notice (CN) power in 2011, following Silentnight's entry into administration. The insolvency came about a few months after HIG, a private equity firm, had acquired Silentnight's bank debt.

Due to the funding position of the scheme, Silentnight's entry into administration would lead to members transferring to the Pension Protection Fund (PPF) (and receiving PPF compensation rather than full scheme benefits), unless substantial additional funding could be obtained.

After an initial investigation, we concluded that a CN might be an appropriate power to pursue. If successful, this would lead to a cash payment being due from the target to the scheme and would be consistent with our statutory objectives of protecting members' benefits and reducing the risk of compensation being required from the PPF.

➤ **Once it was decided that action was necessary, what steps did TPR take? Were the steps taken typical for this kind of case?**

There are a number of legal tests that have to be satisfied for a CN to be

issued against a target. As is typical in our investigations, the first step was to gather information in order to better understand the background circumstances. This included voluntary requests for information as well as using our powers under section 72 of the Pensions Act 2004 to compel the production of information and documents. Although not available to us at the time, the Pension Schemes Act 2021 has given us the ability to compel people to attend interviews and provide answers to our questions in these kinds of cases.

Through our investigation, we obtained vast sums of complex financial information. We engaged expert advisers to support our analysis and establish our case. Once we were satisfied that we had the evidence to demonstrate we met the legal tests, we issued a warning notice. This first warning notice was based on an argument that HIG had underpaid when acquiring the Silentnight business.

Our regulatory procedure allows targets, and any other directly affected parties, to make representations to us about the case set out in the warning notice. We received extensive representations from both HIG (the targets) and the scheme trustees, supported by further evidence. We then investigated those representations.

The trustees' representations prompted our consideration of an

alternative way to put forward our case, namely that, if HIG had not become involved in Silentnight, the company could have refinanced and supported the scheme into the future enabling the scheme to provide its members with full benefits. After further investigation, again with the assistance of experts, we were satisfied there was sufficient evidence to meet the threshold test and decided to issue a second warning notice for the use of the same CN power but seeking a higher amount. That second warning notice was then the subject of representations by HIG and the trustees.

We referred our case to TPR's Determinations Panel, but the case settled before the panel hearing began.

➤ **The case began in 2011 and was settled in 2021. Is this the typical length for this kind of case? If it was longer than usual, what factors led to the case running for 10 years?**

Given the breadth of cases we have across our criminal and regulatory powers we don't have a 'typical' length for cases. They vary due to factors such as the complexity and volume of evidence, number of expert witnesses involved and, often in our larger cases, legal challenges through the courts. We always aim to achieve outcomes as quickly as possible but given the size and complexity of some cases, including Silentnight, they do take a number of years to complete.

However, it's fair to say that this case took longer than most. Part of the reason for that was the complicated background facts and the number of expert witnesses relied on by TPR and the targets.

But the issuing of the second warning notice also made the case take longer, both because there were additional procedural steps that needed to be undertaken, and because the targets sought to judicially review that decision. The court refused to grant permission for judicial review because HIG would be able to pursue its allegations before the Determinations Panel, which could decide on the legality and fairness of the second warning notice accordingly.

➤ Was there anything unusual/atypical about the case?

Yes, there were a couple of features of this case that were unusual. Firstly, the association of the targets in this case to the scheme employer was disputed, and some of our arguments were novel, which we maintain validly established the targets' association.

Secondly, while our cases often feature some evidence from experts, in this case both TPR and the targets relied

on evidence from several experts from different fields. This meant that there was a huge volume of expert evidence that the panel would have had to consider had the case not settled.

➤ Did you find anything particularly challenging in this case? What did TPR learn during this experience that it might take forward in future cases?

With each significant case we run, we seek to embed learning and examine how things could be improved next time.

Most of our previous cases have involved clear-cut routes to establishing association or connection, such as being owned by a common shareholder. The targets' application for judicial review gave us an additional challenge that we don't face in most cases. However, we dealt with the application robustly and dispatched that challenge. We remain of the view that we can lawfully issue multiple warning notices in relation to the same power and the same background facts.

➤ What was the outcome of TPR's actions, and did they satisfy the relevant parties?

In this case, we agreed a settlement with the targets of our regulatory action. The agreement reached was that we would withdraw our case if HIG paid £25 million to the scheme. As such, together with the liquidation proceeds from Silentnight's insolvency process, the scheme has received approximately £35 million in total.

While this sum is insufficient to eradicate the deficit on a PPF basis, it is a substantial sum that will support the PPF in providing benefits to savers in the scheme.

In reaching settlement we considered various factors, including the value of the financial sum being made immediately available to the scheme, the risk of litigating complex regulatory action with the potential for prolonged periods of legal challenge, resulting significant costs and continued uncertainty for savers.

While we are always committed to pursuing good enforcement outcomes through the use of our powers, we will settle cases when we consider it will enable us to reach an appropriate outcome.

➤ Written by Jack Gray

