



MF Global gave implied indemnity for section 75 liability

The use of service companies to engage employees is a well-established practice. The recent High Court case of *Heis & others v MF Global UK Services Limited (in administration) [2015] EWHC 83* explains the implications of this structure for operating companies which have a final salary pension scheme.

The background

MF Global UK Services Limited (Serviceco) was the service company for MF Global (UK) Limited (MFG). Employees of Serviceco were seconded to MF Global group trading companies, predominantly MFG, although no express contractual arrangements were put in place concerning those secondments. A services agreement was entered into in 2007 between Serviceco and MF Global Holdings Europe Limited (Holdco), which obliged Holdings to procure that each group company to which Serviceco employees were seconded would payroll costs to Serviceco on a pound for pound basis. This aside, Serviceco had no other income.

Serviceco operated a final salary pension scheme for those of its employees who were seconded to MFG. An actuarial valuation finalised in 2009 revealed a substantial funding deficit, following which the scheme trustees and Serviceco agreed a recovery plan, payments for which were made directly by MFG.

After Serviceco and MFG entered administration in 2011 (triggering a section 75 debt of circa £35 million), MFG and Serviceco entered into a settlement agreement with the pension trustees, under which MFG would pay £29 million to settle the section 75 liability, on behalf of both itself and Serviceco. This was concluded in 2013. One outstanding issue was whether MFG - in the absence of express agreement between itself and Serviceco dealing with reimbursement of employment costs - was liable to indemnify Serviceco for the section 75 liability.

Although Serviceco and MFG concluded a separate agreement to use their “reasonable endeavour” to reach a settlement of that aspect of Serviceco’s claim against MFG, no agreement was reached on the issue. MFG’s administrator applied for a determination of whether MFG was liable to indemnify Serviceco for the section 75 debt.

What did the court decide?

The Court ruled that MFG **was** liable to indemnify Serviceco for the section 75 liability. The judge found that MFG had reimbursed Serviceco for payroll costs under an implied contract with Serviceco and not under a contract between MFG and Holdco to which Serviceco was not a party. Although the services agreement between Serviceco and Holdco had envisaged that the latter situation would be the case, none of the evidence showed that Holdco played any part in the employee secondment and payroll reimbursement arrangements between MFG and Serviceco, nor (unlike MFG and Serviceco) did its accounts make any mention of such arrangements. The court also considered correspondence issued at the time of the 2009 service agreement which showed an intention (on the part of both MFG and Serviceco) that MFG would be making direct reimbursement to Serviceco for payroll costs, and considered it “overwhelmingly likely” that MFG had intended to enter into legally binding relations with Serviceco (and vice-versa) to govern the secondment of staff.

A consequence of that implied contract was that MFG would indemnify Serviceco in respect of the section 75 liability, as otherwise Serviceco would be left with a substantial pension funding liability which it had no resources to meet. The references in the 2009 agreement to pension “contributions” did not exclude the section 75 debt, as the legislation did not circumscribe those references to “contributions” to those made voluntarily/regularly by an employer, nor did the reference to “costs” in the 2009 agreement exclude the section 75 liability as a cost of secondment.

What does this mean for practitioners?

It is likely that a number of group employment arrangements and pension schemes operate in a manner similar to MFG. Even where group companies to which employees are seconded do not make payments directly to a service company (but rather route them through a holding company) so as to give rise to an implied contract, such arrangements will nevertheless make the group companies a target for an FSD from The Pensions Regulator, as was the case with Lehman Brother International (Europe).

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