

LUNCHTIME TALK

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“INSURANCE AND PENSIONS: CONFLICT AND CO-OPERATION AT HOME AND ABROAD”

by Tony Thurnham, Chairman,
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I have been invited to give this talk in my capacity as Chairman of the Association of Pension Lawyers. That said, it is inevitably going to be a personal view. The sorts of things I want to touch on are:

- what is a pension?
- where do insurance companies come in?
- what is a pension law?
- what is a pension lawyer?
- where are pension lawyers found?
- how do pension law and lawyers interact with insurance law and lawyers?
- how do the answers to all these questions change when you look beyond the borders of the UK?
- where does 1992 come in? (After all, it always does).

What is a Pension?

What do we mean by a pension? Basically, we mean a life annuity commencing on retirement from paid work.

Such a pension can be provided, basically, from one of three sources (referred to by the Swiss as the 3 pillars):

- The State;
- The former employer;
- Individual saving.

The insurance element is essentially that of eliminating risk. The risk can be of two kinds:

- risk of living too long;
- risk of investing badly.

It's clear here straight away that we are in the "long term" business. That's why this session is being held jointly with the Life Assurance Legal Society. Indemnity insurance and credit insurance do have interesting but peripheral connections with pensions – unfortunately I won't have time to look at these today.

Returning to the most relevant risks – those of living too long and of investing badly – these can be borne in one of several ways:

- by the State;
- by a commercial insurance company;
- by the employer;
- individually;
- mutually between a group of participants.

Now these distinctions don't neatly coincide with the "3 pillars". Let's look a little more closely at the situation in the UK.

- **State Pensions:** We call these "National Insurance". They aren't, however, organised directly on any commercial insurance principle. The term "insurance" was applied to them to take away the stigma of the poor house. It's not charity – you've paid for it. But at the end of the day, the State is operating in a redistributive role – acting as an intermediary in asset transfers between different sectors of the population.

- **Company Pensions:** In the smallest companies, these are individually directly insured with an insurance company on a "money-purchase" basis, much like a with-profits or unit-linked annuity purchased by an individual. Companies with more employees tend to set up pooled pension funds. The smaller of these lay off with commercial insurance companies at least part of the investment responsibility and the risk of low mortality. The larger ones take more of the risks themselves. This is a topic I shall come back to.

- **Personal Pensions:** Essentially, these are highly tax favoured, and highly regulated, forms of personal saving. The tax laws require the benefit to be paid as a life annuity starting at a certain age (with limited commutation), so the risk of living too long is laid off with a commercial insurer. The investment responsibility is taken by one of a range of institutions including insurance companies, banks, building societies and unit trusts.

At a wider level, individuals also save up for old age by a range of other less tax

favoured methods, with a greater or lesser degree of laying off investment responsibility and the risk of living too long.

To a certain extent the 3 pillars are interchangeable. In the UK one can “contract-out” of part of the State Scheme with a company pension or personal pension. One can also “opt-out” of a company scheme, with or without taking out a personal pension instead.

Where Do Insurance Companies Come In?

Now the actual part played by insurance companies in providing pensions changes over time. The one thing that has been constant is that the amount of money tied up in the pensions industry has been ever growing. Looking at the role played in the UK by insurance companies in handling this money, I think we can distinguish 3 periods:

- **The Insurance Hegemony.** Until the mid 1960s, the vast majority of pension business was undertaken by insurance companies. With minor exceptions (industry-wide so called “trust schemes” and friendly societies) only they could undertake tax-favoured personal pension scheme business. As for company schemes, all but a very few invested all their money directly in individual or group insurance contracts.

- **Things Fall Apart.** As company pension schemes grew considerably during the period from the mid 1960's to the mid 1980's, the advice available to them became more sophisticated. They realised that the insurance contracts they bought in fact represented a bundle of services, including:
 - risk management;
 - investment;
 - administration;
 - actuarial;
 - legal.

The market pressure on insurance companies in group business was to unbundle these services, so that customers (the large pension funds) could judge whether each particular service was best bought (bearing in mind both quality and cost) from:

- the insurance company;
- a specialist service firm;

- in rebundled form from an insurance broker/pension consultant
- or even provided in-house.

Were insurance companies destined to play an ever smaller proportionate role (albeit greater in absolute terms) in the pensions market?

- **The Empire Strikes Back.** The big pension funds, those which have most unbundled the services they bought – were organised on a “final salary” basis. Good in concept as this is, the common lack of inflation adjustments tended to give a raw deal to the “early leaver”. This, together with the Government’s desire to persuade more people to contract-out of SERPS (the “State Earnings Related Pension Scheme”), has led to a flood of legislation in the late 1980s all of which has tended to boost individual pension provision at the expense of company pension schemes.

This includes:

- the right to opt out of a company pension scheme and take a personal pension instead;
- the right to contract-out of SERPS and have a personal pension;
- the right to take a transfer payment from a company pension scheme to a personal pension scheme.

As I mentioned earlier, the “mortality” risk in personal pensions can only be taken by an insurance company or friendly society, and the “investment” responsibility can be taken by these or by banks, building societies, unit trusts or other investment managers.

Insurance companies are clearly a long way from being a spent force in pension provision.

What Is Pension Law? What And Where Are Pension Lawyers?

So much for pensions and insurance companies generally. Let’s turn to the legal side.

Pension law consists of a bundle of legal aspects of pension provision, including elements of:

- tax law;
- social security law;
- insurance law;
- trust law;
- employment law;
- company/commercial law.

During the days of the “insurance hegemony” up to the mid 1960's, there were only a very few lawyers in private practice – in the very large firms – involved in pension law. A great proportion of the work was done by non-legally qualified technicians employed by insurance companies.

During the first part of the “unbundling” (“things fall apart”) period, say from the mid 1960's to the mid 1970's, the large firms of lawyers in private practice tended to recruit some of the most experienced of these technicians, to assist the law firms in providing pensions documentation services for their large clients whose pension funds were no longer full-service insurance company clients.

Increasing size and sophistication of the pensions market, however, meant that these technicians alone could not provide all the skills required by commercial clients of their law firms. There was also a need for more general lawyers with a knowledge of fundamental legal principles. Furthermore, the increasing importance of the company/commercial elements of the work (mergers and acquisitions) required a different sort of person. The solution was that qualified lawyers in the law firms themselves turned to pension law, and departments were built up by recruitment from the firms' own articled clerks.

All over the City of London, new “pensions lawyers”, seen as oddballs by their firms, were working away in small departments of ones and twos. In the late 1970's, we formed the “Informal Pension Lawyers Discussion Group”. In 1984 this matured into the Association of Pension Lawyers, which now has over 300 members and affiliates.

The intention to distinguish pension lawyers from technicians is clear in the constitution of the Association, which distinguishes between:

- Full Members – barristers or solicitors in private practice with at least 3 years experience of a wide range of aspects of pension law.
- Associate Members – Ditto, but not in private practice (eg. employed by an insurance company, pension consultant or industrial company).

- **Affiliate Members** – As for a Full or Associate Member but with experience less than 3 years.

The Committee has an overriding discretion to make exceptions in special cases. The only practical differences between the grades is that only full members can have a vote or sit on the Main Committee.

Interested persons not eligible even for affiliate membership may subscribe to “Pension Lawyer”, the official journal of the Association.

Pension Lawyers And Insurance Lawyers

So far, only a few in-house insurance company lawyers are associate or affiliate members of the APL. Most of these have joined in the last year or two, as a result of getting involved in pension law for the first time when helping their companies put in place products devised to implement the recent “personal pension” legislation.

Outside Our Borders

Things begin to get really interesting when you put them in an international context. In the English speaking world, you get a picture much the same as in the UK. There is, however, no other national organisation quite like the APL. The Australians have a rather informal “Lawyers Superannuation Committee”, and the Americans and Canadians have Employee Benefit Committees of their respective Bar Associations. (In the UK, the Law Society refused to set up a pension committee in the early 1980s, saying it was of “minority interest”. They have recently showed interest in adopting pensions as a post-qualification “specialism”).

In Europe, the position is somewhat different. Private practice law firms do not play as wide a role in business as they do in the UK. In many European countries, insurance companies still have the “hegemony” over the pensions market that they did in the UK up until the mid 1960s. Specialised lawyers with the most in depth knowledge of pension law are perhaps more likely to be found within the insurance companies than is the case in the English speaking world.

Now BILA is an affiliated body of AIDA – the Association International du Droit des Assurances. AIDA has a number of working groups all but one of which are, I believe, in the general insurance field. The one which is in the life insurance field is, in fact, the Pensions Working Party, chaired until his recent retirement by Professor Mok of the University of Rotterdam.

A few UK lawyers attended the founding meetings of the Working Party at the 6th AIDA World Congress, in London 1982. A different few attended the meeting of the Working Party at the 7th World Congress in Budapest in 1986. The result of this co-operation was that the APL and the AIDA Working Group co-operated in holding an International Conference on Pension law in London in July 1987.

This conference was the second part of the "The London Week", the first part of which was the colloquium of BILA, and both of which were extremely ably organised by Michael Cohen. The 110 participants were drawn from APL, the AIDA Working Party, and the members of the US, Canadian and Australian groups I referred to earlier. Its proceedings, together with a questionnaire devised by Professor Mok and answered on behalf of 17 countries were published in the 700 page Graham & Trotman "International Handbook on Pensions Law and Similar Employee Benefits".

In June 1989, a further conference was organised in Apeldoorn, Holland, on behalf of the same parties by the fledgling Netherlands' Association of Pension Lawyers. The voluminous papers will be published as a supplement to the Handbook.

The work will be continued in June 1991, at the next biennial conference in Cascais, Portugal. This will also see the formal creation of the International Pension and Employee Benefit Law Association (IPEBLA). In the period running up to the conference, we will be holding a prolonged membership drive, seeking out lawyers with pensions expertise in Europe and throughout the world, whether in private practice, in insurance companies, in other consultants, in industry or in the academic world.

1992 And All That

The 1989 Apeldoorn conference was attended by a non-lawyer (in fact an actuary) from the EEC Commission. It is interesting to see that a further twist to the relationship between insurance and pensions has been given by the EEC.

As most of you will know, the draft Second Life Assurance Co-ordination Directive will enable an insurer based in one ("home") state to cover a risk in another ("host") state without being established there. And in cases where the policyholder in the host state has taken the initiative in seeking the insurance abroad, the insurer will not need to be authorised in the host state.

The original draft excluded group and employment related insurance (eg pensions). But these are now going to be included. DG XV is also preparing for Member States a discussion paper looking at the future. This will discuss whether the principle of the

“level playing field” requires that pension funds, as well as insurance companies, should be free to cover employees in other Member States.

We understand that the discussion paper will also look at the possibility of a “Pan-European Contract” and “Pan-European Pension Fund” taxed on the basis of territoriality. That is to say, contributions and benefits would be taxed in the State or residence of the contributor or beneficiary, and the fund or insurance company would be taxed in its country of residence. In each case, the taxing State could make no discrimination between the treatment of domestic and Pan-European contracts or funds.

Added to that, the Action Programme on the Social Charter has also promised a “communication” this year with a view to initiating a debate at community level on labour mobility aspects of occupational pension schemes (e.g. international transferability).

Conflict and co-operation at home and abroad – I think the story is just beginning!

PROPOSED STRICTER ENVIRONMENTAL LEGISLATION: ITS IMPACT FOR LIABILITY

by R M Aickin

1. Introduction

This article is written in the Spring as the Environmental Protection Bill reaches the end of its House of Commons Committee Stage and the Department of the Environment is in the early stages of preparing for the long awaited White Paper on the Environment. Both of these processes will be much further along and may be much changed when the Journal is published. There is confident expectation that the Environmental Protection Bill will have been given the Royal Assent and that the White Paper will have been published before the end of July. The White Paper is expected to lead to further Environmental Protection legislation in the 1990-91 session of Parliament. This is therefore a somewhat challenging article to write as it needs to be both predictive and descriptive and may well be overtaken by events in the course of publication.

2. Historical Basis of Control

It is often forgotten, as part of the Dirty Man of Europe image, that Great Britain has a