



# Right move

**Jonathan Silverman and Jennie Kreser explain how capitalising on intellectual property rights could unlock funds from a client's pension fund**

**A**t a time when fundraising for SMEs is intensely difficult and the suggestion that the clearing banks are more concerned about rebuilding their balance sheets, it may be helpful to a corporate client to explain how they might use their intellectual property rights as a means of raising money from the company's own pension fund.

A company's IPR is often unrecognised as the valuable asset it is and, while historically it has not been seen as the most obvious candidate to use as collateral or investment in today's world, it is well worth a go.

Intellectual property refers to the bundle of legal rights covering copyright, patents, trademarks design rights know-how contracts and client databases. Usefully, a number of those are registrable which helps to establish their validity and to identify the ability to grant exclusive rights to exploit those protected rights commercially.

At first glance it may seem unlikely a pension fund can be used to acquire IPR from a client's own company. As lawyers we sometimes show reluctance to do anything creatively with pension funds, especially after the fiasco following the Maxwell fraud in the early 1990s and the legislation which followed, but things have moved on and there is certainly an opportunity for clients to consider selling their intellectual property to their pension fund if the circumstances are right. In essence pension funds can purchase IPR as long as that purchase is made at arm's length and the scheme is empowered to make purchases of that nature.

In the UK, most occupational schemes are run under a trust – sometimes the appointed trustees can be the directors. They must of course run the scheme for the benefit of the beneficiaries; however, they also have the ability to invest the scheme assets as if they

owned them outright and the power of investment more often than not extends to intellectual property – hence the opportunity.

The key to achieving success is that the trustees have to satisfy themselves that the investment in IPR satisfies certain basic criteria.

### Key to success

First, obtain thoroughly independent and sustainable valuation of the IPR (once all the IPR has been identified and which is available to be transferred). Remember that a company's brand is made up of various facets, so with a fashion company it may be their trademark, all copyrights and design rights associated with their product range, and even the IPR protecting production capability and contracts – a total bundle of assets should be properly identified and valued as a whole before being offered to the pension fund so as to achieve maximum value.

One key factor in valuing IPR is the terms of the proposed licence back from the pension fund to the company and in that context working out what the income streams will be; payments are deductible for corporation tax purposes – an added bonus as to the tax efficient means of funding.

Another factor is to calculate discounted cash flow value generated by the IPR over its useful life. Compare other transactions to establish values and to adjust accordingly, take into account such aspects as recreating the IPR and the cost of its creation.

Evaluation is governed by the International Organisation for Standardisation, the International Accounting Standards Board and the International Valuations Standards Committee.

Moreover the pensions regulator now accepts less traditional assets as being acceptable for pension fund investment; within the last 12 months we have seen PFI contracts,

shares in the broadcasting subsidiary, a mixture of assets including trademarks and in one case even barrels of whisky, so registered IPR generating an income stream should not in itself cause a problem.

Yet trustees must not only follow precedent but also exercise their investment criteria in accordance with the Occupational Pension Schemes Investment Regulations 1995 which demand that trustees choose investments carefully to ensure their suitability.

SMEs benefit though by a useful exception from the scope of the requirements; regulation 7 – the investment requirement does not apply to schemes with less than 100 members – as a result most SMEs schemes will be sufficiently small to enable this exception to be taken advantage of quite effectively.

Small self-administered schemes are ideal because they are flexible. SSAs are occupational pension schemes operating under a trust for the benefit of less than 12 members and usually established by and for a business owner and his key employees – just the sort of situation which one comes across regularly in need of funds.

In addition the trustees and members in a SSAS are the same, so, as long as the scheme is kept separate from the business, and secures an asset at a fair value at arm's length, then the obligation as a trustee is satisfied.

Both quoted and small companies have recently been involved in selling IPR to their pension schemes; one involved valuing a patent, copyright, know-how design rights and the trading reputation resulting from an engineering process.

In that case the patent was crucial to the business, the trustees could also demonstrate that if the company was to fail they would have a fairly good chance of licensing the rights to a third party. However, always ensure trustees act prudently when acquiring the rights on a conservative basis and perhaps also take a discount from market value.

In another instance, a well-known and established supplier to the retail sector capitalised on their trademark as well as their supply agreements and customer databases as part of a package of rights which were then sold to the pension fund thus dealing with a short-term cash crisis.

Many companies have IPR rights, and they need to recognise that they have a significant value and, when utilised to unlock cash held within the pension fund, this could be a valuable resource to enable the business to move forward.

Jonathan Silverman and Jennie Kreser are partners at Silverman Sherliker