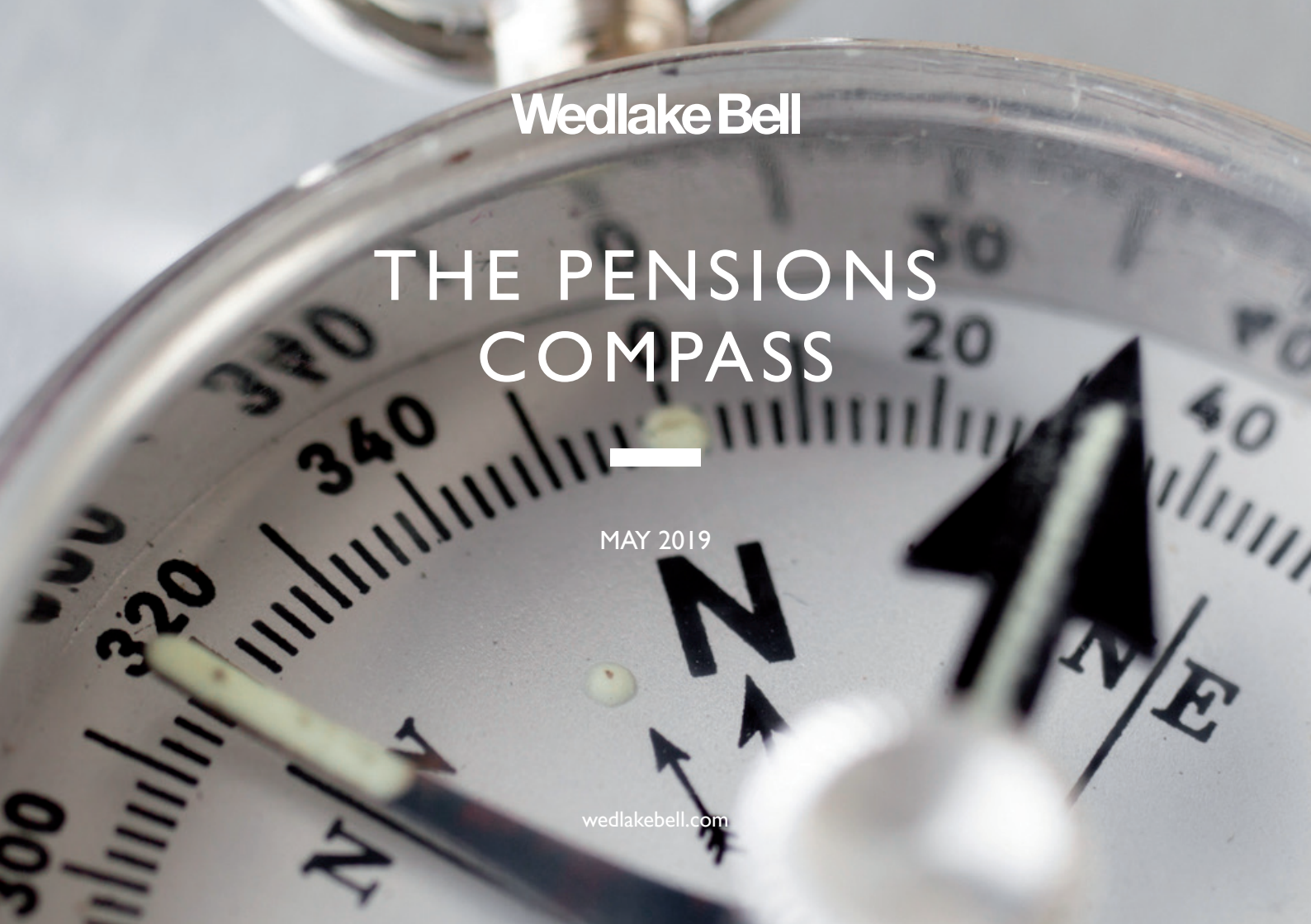

Wedlake Bell

THE PENSIONS COMPASS

MAY 2019

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INTRODUCTION

Welcome to our May 2019 edition of Pensions Compass. We are pleased to welcome Anna Giles to the team for a period of six months as part of her training contract. Some of you will have the opportunity to meet Anna at meetings and/or forthcoming events! This edition includes:

- Clive has provided an update to his usual ready-reckoner, a go-to tool for the industry regarding the latest position on case law, legislation and governance;
- In recognition of the Civil Partnerships, Marriages and Deaths (Registration etc.) Act 2019 coming into force this month Alison has recorded a podcast looking at pension benefits provision over the years for civil partners and spouses (whether same-sex or opposite-sex) and provides some action points for trustees and employers to ensure their scheme is keeping up with the times;
- Justin considers 21st century trusteeship and the new challenges facing trustees and employers in a world where the Pensions Regulator is more keen than ever to evidence it can bite as well as bark!;
- Anna reviews the latest action taken by the FCA against three financial advice firms and the five individuals who ran those firms for acting without integrity in relation to their provision of pensions advice;
- Clive reviews the recent interesting Court of Appeal judgment in *BIC UK Limited v Burgess*. The Court concluded there was no legal magic wand available to rescue pension increases previously minuted and announced; and
- Katie summarises how pensions are being dealt with by Debenhams in anticipation of a CVA being put in place.

We hope you enjoy this edition of the Pensions Compass.

If you have any questions regarding any of these topics please do get in touch.

For further details on these matters or any other pensions related queries, please contact a member of the Pensions and Employee Benefits team.

Alison Hills, Partner and Editor-in-Chief

PENSIONS READY RECKONER

PARLIAMENT		
Recent Legislation	**Date in force**	**Effect**
Age Discrimination – Equality Act Exemptions Order	15 May 2019	Consequential on increases in State Pension Ages, permits schemes to continue paying bridging pensions without breaching age equality requirements.
Civil Partnerships, Marriages and Deaths (Registration) Act 2019	26 May 2019	In relation to pensions, the Act paves the way for opposite sex couples to marry or register a civil partnership. The new civil partnership facility is dependent on Government making the necessary Regulations. Please refer to Alison's ***podcast***, published May 2019, for a run through of the legal developments relating to same-sex spouses and civil partners.
Investment Disclosures (SI 2018/988)	1 October 2019	By 1 October 2019, Trustees to clarify in their Statement of Investment Principles (1) their policies on "financially material considerations" including Environmental, Social and Governance (**ESG**) considerations, which the trustees consider financially material factors, and (2) the extent to which (if at all) they take into account "non-financial matters", and (3) stewardship matters.

PARLIAMENT		
Proposed Legislation	**Expected Date**	
Divorce (Financial) Provisions Bill	2019/2020? House of Commons stages of Bill awaited	The Bill specifies as a fair starting point equal division of all property and **pensions acquired** by the couple **after marriage**.
Pension Charges Bill 2017 - 2019	2020? First reading in House of Commons 8 May 2019	The Bill requires pension providers to publish standard information on charges for pension products and to cap such charges.
Pensions Bill 2020	?	Subject to Parliamentary time, it seems the Government may introduce a Pensions Bill to fill certain gaps in existing legislation relating to conversion of GMPs into non-GMP pension.

DWP Consultations	**Date**	
DWP – Consultation on Collective Defined Benefit Schemes ("**CDCs**")	6 November 2018	Government is committed to enabling employers to provide a third type of scheme structure, reflecting risk sharing between employers and employees. Timing uncertain due to Brexit.
DWP – Strengthening TPR's powers	January 2019	Following the BHS and Carillion problems, Government will introduce two new criminal offences, including harming schemes by wilful neglect, as well as legislation to strengthen TPR's powers of investigation and inspection. Timing uncertain due to Brexit.
DWP – Guidance for statutory conversion of GMPs	April 2019	Paves the way for ironing out the unequal effects of GMPs, by converting members' GMP benefits into non-GMP scheme benefits. However, some issues remain including the need to identify members' historical employer to obtain employer consent to statutory conversion.

FROM THE COURTS

Topic	Recent decisions
Incapacity Pensions *Universities Superannuation Fund v Scragg* High Court, January 2019	Reversing the Pensions Ombudsman, the High Court decided the scheme trustees are not bound by the University's conclusion on the member's incapacity. Wedlake Bell comment: incapacity pensions continue to be a tricky area and legal advice is usually essential.
Pension increases *Coats UK Scheme v Styles* High Court, January 2019	Reversing the Pensions Ombudsman, the High Court held the pension increases granted were valid. The High Court based its decision on the combined effect of section 68 Pensions Act 1995 and the Registered Schemes Regulations 2006. This is a useful look at these provisions.
Trustees duties – interface with employer *KeyMed v Hillman* High Court, March 2019	Alleged abuse of their position by Directors of a company (the Directors were also scheme trustees). The High Court decided in the circumstances the Trustee owed the employer no fiduciary duty and merely a duty to consider their interests. Wedlake Bell comment: the leeway given to the trustees by the Court in this case was wide – trustees should tread carefully in considering employers' interests.
Sex equalisation: retrospective levelling down *Safeway Ltd v Newton* Advocate General's Opinion, March 2019	Reference by the Court of Appeal to the European Court. In his Opinion the Advocate General states EU law precludes levelling down, even if levelling down would be permitted under UK law considered in isolation. It remains to be seen whether the European Court agrees with the Advocate General when it makes its decision in a few months' time.
Tax: whether "just and reasonable" to excuse member from tax charge *Franklin v HMRC* First Tier Tax Tribunal, April 2019	A member's honestly held belief about the tax effect of pension scheme loans was not on the facts reasonable, and therefore the member could not be exempted from the unauthorised payments tax charge.

FROM THE COURTS

Topic	Recent decisions
Section 75: employer debt claimed from all participating employers *PS v China Shipping* High Court, March 2019	As the High Court decided the scheme was not segregated (divided into separate legal sections), all the participating employers were liable for the section 75 debt of an exiting employer. Permission to appeal to the Court of Appeal has been applied for. Wedlake Bell comment: it is good the Courts are grappling with the true meaning of the segregation provisions of the Employer Debt Regulations.
Validity of increases BIC UK v Burgess Court of Appeal, May 2019	Despite many seemingly good arguments, the Court of Appeal unanimously decided that failing to comply with the scheme's amendment formalities meant that the pre-1997 pension increases awarded could not stand. Please see Clive's full ***article*** in the May 2019 edition of Pensions Compass.

OTHER MATTERS

Topic	Effect
GMP equalisation – tax aspects	HMRC has convened an industry working group to assist it in resolving the tax treatment of extra member payments relating to GMP sex equalisation, see generally the Lloyds Bank High Court decision mentioned above. Tax uncertainty and the outstanding Consequentials Hearing are two difficulties schemes face in implementing GMP equalisation.
Polite reminder on Auto-Enrolment	The employer's full contribution rate of 3% of band qualifying earnings came into force on 6 April 2019, taking the total minimum contribution to 8%.

FORTHCOMING COURT DECISIONS

Topic	Effect
Trustee's power to award increases *British Airways* Supreme Court	The BA scheme trustees have announced settlement terms with BA, subject to Court approval to be sought in July 2019. If the High Court approves settlement terms, the appeal to the Supreme Court will not take place and this litigation will come to an end – no doubt a relief to the participants but unfortunately not definitively settling legal duties of employers and trustees under DB schemes.
Tax: deductibility of in specie contributions *Sippchoice v HMRC* May 2019	First Tier Tribunal decided the member's transfer of shares to his SIPP was a tax deductible contribution. HMRC's appeal to the Upper Tier Tribunal is due for hearing in late May.
Tax: HMRC revoking taxpayer's Fixed Protection Certificate *Hymanson v HMRC* Upper Tribunal (date awaited)	In a key test of HMRC's powers, the taxpayer successfully argued in the First Tier Tribunal that his continued pension contributions were mistaken and could be rescinded, thereby keeping his Fixed Protection intact. HMRC has been given permission to appeal to the Upper Tribunal. The principle at stake here is important – when can a transaction be ignored for tax purposes and unwound on the basis the taxpayer did not understand the tax consequences.
TPR Financial Support Directions Granada v TPR (Box Clever case) Court of Appeal	The extent of TPR's powers to issue Financial Support Directions in the context of joint ventures. This long running litigation explains why the Government is keen to streamline the FSD legislation as proposed in the Government's Statement in February 2019 "A Stronger Pensions Regulator".
Discrimination – equalisation of women's state pension ages High Court, 5 and 6 June 2019	Judicial review of Government's method for increasing State Pension Age for women from 60 to 65.

FORTHCOMING COURT DECISIONS

Topic	Effect
RPI/CPI *BT Telecommunications v BT Pension Trustee* Supreme Court (date awaited)	The scheme rules permitted switching of the index for pension increases where the existing index "becomes inappropriate". In October 2018 the Court of Appeal decided RPI had not become inappropriate. A hearing date for BT's appeal to the Supreme Court is awaited.
GMP sex equalisation – Consequentials Hearing High Court (date awaited)	Last but not least: the High Court in its decision in the Lloyds Bank case in October 2018 (page 6 ***Pensions Compass,*** January 2019) stated that various important ancillary matters would be decided at a further hearing known as the "Consequentials Hearing". These matters include the treatment for GMP equalisation purposes of transfers to and from schemes and the circumstances in which trustees can for administrative simplicity/cost reasons not completely iron out the effects of GMP inequality. No date has been set for the Consequentials Hearing.

Clive Weber, Partner – Pensions & Employee Benefits Team
Please contact Clive with any queries on this Ready Reckoner

A TRUSTEE FIT FOR THE 21ST CENTURY

Background

In 2016 the Pensions Regulator ("**TPR**") carried out extensive research which identified that many schemes were not being run to standards expected by TPR. Off the back of these findings TPR launched an education programme which sought to combat poor governance and raise standards across all types of pension schemes no matter how big or small.

TPR's "21st Century Trusteeship" programme doesn't necessarily bring anything new to the table in terms of what constitutes good governance. TPR is not creating new or higher standards of governance for those running schemes but rather it is seeking to clarify exactly what 'good' governance should look like. Legislation, guidance and of-course the trustee training tool-kit already exists for many governance areas expected by TPR. This programme seeks to bring things together in one place.

Importantly TPR now sets out in greater detail what action it will take in response to breaches of these standards and from our own experience, TPR is certainly living up to its promise of issuing more fines, naming and shaming those trustee boards who fall short of expected standards and in some instances have removed those trustees who are not up to the job. For instance, in the last week, the pension trustees of Dunnes Stores in Northern Ireland have been stopped from running its defined contribution scheme by TPR, following "a catalogue of governance failures".

21st Century Trusteeship

TPR has set out five key areas requiring attention with a further ten sub-categories sitting below these (***https://www.thepensionsregulator.gov.uk/en/trustees/21st-century-trusteeship***).

Some of the key messages are set out below:

1. **Governance, roles and strategy**
   - Get back to basics. Trustees need to make sure they have up-to-date information about the scheme. For instance, understand when the scheme PPF levy is to be paid and complete the scheme return on time;
   - TPR recognises that running a pension scheme can be complex and challenging. Good governance is therefore key to helping trustees overcome these challenges so that they can deliver the best to the membership;
   - Having people, delegation structures and processes in place tailored to the schemes' needs (proportionate to risk and complexity) will help trustees make decisions effectively, manage risks as well as helping them seize opportunities that will facilitate long-term objectives; and
   - TPR already takes action against breaches of the basics and will increasingly focus on schemes which have wider governance issues.

2. Training, skills and advisers

- Trustees are legally required to have relevant knowledge and understanding of pension and trust law and key scheme documents like the trust deed and rules and statement of investment principles;
- A 21st century trustee should have the knowledge and understanding to perform his or her role within six months of their appointment;
- Trustee boards should identify its strengths, weaknesses and any gaps in knowledge and understanding by carrying out individual trustee evaluations. This will inform training needs;
- Performance and effectiveness of the board annually and refer to the objectives in the trustee board's business plan;
- Select the right advisers to provide advice and manage certain aspects of the scheme – this is a vital part of governance; and
- Retain sufficient oversight of the tasks that are delegated to others and regularly review and manage their performance.

3. Risk and conflict of interest

- Trustees are required to create a plan to identify, document, evaluate and manage risks. This risk framework should be reviewed at least annually;
- Trustees must make sure they have a conflicts of interest policy in place to help identify, manage and avoid conflicts for trustees, employers, advisers and service providers;
- Trustees to make sure they are satisfied with their advisers' and service providers' conflicts policies; and
- Make sure they are aware of the services the providers or advisers supply to the employer, and manage any potential conflicts of interest.

4. Meetings and decision making

- The trustee chair should provide effective leadership, demonstrate decision-making skills at meetings, and encourage open and constructive debate;
- Trustees should arrive fully briefed on the agenda (circulated at least two weeks before the meeting) and prepared to discuss each item;
- Trustee boards should meet often enough to maintain effective oversight and control, which in most cases will be at least quarterly; and
- Minutes should be taken at every meeting with the topics to be covered to include the following:
  - apologies for absence
  - conflicts of interest
  - approval and signature of minutes from previous meeting
  - actions arising from previous meetings
  - investment performance and strategy
  - risks to the scheme (new and existing)
  - administration including discretion cases and complaints
  - member engagement, including communications
  - sub-committee decisions

- trustee and adviser fees and expenses (i.e. budget monitoring)
- any decisions made since the previous meeting
- trustee training
- business plan
- notifiable events
- any other business

5. Value for members

- Trustees of DC schemes have a legal duty to produce a Value for Members ("**VFM**") assessment and include findings in their annual chair statement;
- The VFM assessment can have a significant impact on members' savings and help safeguard positive member outcomes;
- When compiling the VFM assessment, trustees should adopt a proportionate approach, based on the characteristics of their scheme; and
- It is strongly recommended that DB schemes assess value for members to help ensure good member outcomes.

Now is the time…

The heavy regulatory burden imposed on schemes in recent years, combined with the introduction of auto-enrolment means that many schemes may not have spent the time they would have liked in reviewing governance procedures. In particular, DC scheme governance may have suffered simply because the spotlight (including that of TPR) has been focused for the large part on DB schemes and the inevitable funding and deficit issues that go hand in hand with these schemes and their legacies.

However, it is official - DC membership has now overtaken over that of DB schemes and trustee boards may want to look closely at the skills necessary to look after DC schemes where the member ultimately bears the risk for their own financial security. Engaging the younger generation should form part of this analysis. For instance, 'millenials' whose early careers are spent grappling with student debt, soaring hose prices, eye watering rents and lower salaries than previous generations will either view retirement saving as something to be kicked into the long grass for the time being or simply unrealistic.

Furthermore, as we see Environmental, Social and Governance issues ("**ESG**") such as climate change finding its way into trustees' investment considerations, there should be more active efforts to co-opt younger people on to trustee boards.

Wedlake Bell Pensions & Employee Benefits team is here to help

Where you are unsure about the role of a 21st century trustee or indeed if TPR is enquiring after your scheme's compliance with its programme, we are happy to assist by working with you to ensure that you are meeting your legal obligations.

Justin McGilloway
Partner and Head of Pensions & Employee Benefits Team

FCA DECISION NOTICES REGARDING PENSIONS ADVICE BUSINESS: ACTING WITHOUT INTEGRITY AND MISLEADING THE FCA

Earlier this month the FCA published Decision Notices against three financial advice firms and the five individuals who ran them for acting without integrity in relation to pensions advice and for misleading the FCA.

The FCA has said that the three firms, Financial Page Ltd ("**FPL**"), Henderson Carter Associates Ltd ("**HCA**") and Bank House Investment Management Limited ("**BHIM**") (together, the "Firms") held themselves out to retail customers as providing bespoke independent investment advice based on a comprehensive and fair analysis of the whole market, but that did not reflect the reality of the service that was provided. The reality according to the FCA was advice recommending pension switches and transfers to "products that invested in high risk, illiquid assets which were unlikely to be suitable for them".[1]

Pension Review and Advice Process

The Firms adopted a Pension Review and Advice Process that involved outsourcing important functions to unauthorised third parties.

According to the FCA's Decision Notices, the process involved the third parties sourcing leads and introducing customers to the Firms. Customers were involved in fact-finding exercises relating to their pensions, the results of which were inputted into software that then produced suitability reports in respect of the recommended transactions. The process was structured to result in customers who met certain pre-set criteria being advised to switch their pensions to Self-Invested Personal Pensions ("**SIPPs**") investing in "high risk, illiquid assets not regulated by the FCA".

In total, during the period in question, over 2,100 customers of the Firms switched or transferred pension funds totalling approximately £76.5 million to SIPPs investing in "high risk, illiquid assets that were unlikely to be suitable for them, thereby exposing them to a significant risk of loss". [2]

Dishonesty

The Firms, according to the FCA, were aware of what the Pension Review and Advice Process involved, and therefore knew that customers were being misled. Furthermore, one of the third parties had a material financial interest in a number of the investments that was not disclosed to customers. Customers were not aware of the true nature of the service being provided, and were therefore denied the opportunity to make informed decisions on whether to use the Firms' services and whether to invest in the products recommended to them.

1 FCA News: *https://www.fca.org.uk/news/press-releases/fca-publishes-decision-notices-against-three-firms-five-individuals-acting-without-integrity*

2 FCA Decision Notices for FPL, HCA and BHIM.

The FCA considers that the businesses adopted the Pension Review and Advice Process in order to generate fees and to increase the number of customers that they could advise about other investments, and thereby generate further fees. In doing so, the businesses put their own interests before those of their customers.

Lack of Integrity – Individuals

One of the individuals, Thomas Ward, acted as a director for FPL despite not having the requisite FCA approval to do so. According to the FCA, Mr Ward "disregarded the interests of FPL's customers and showed a willingness to enrich himself at their expense". Furthermore, the FCA considers that Mr Ward "took deliberate steps to control and influence the information that FPL disclosed to the FCA" and that he encouraged another director to withhold important information and also drafted communications that were false and/or misleading.

The FCA has said that the two directors of BHIM, Robert Ward and Tristan Freer, as well as Andrew Page (director of FPL) and Aiden Henderson (director of HCA) "should have known that the products were unlikely to be suitable for retail customers… but acted recklessly in closing their minds to the obvious risks". These four directors were all approved persons in a controlled function at their firms, the FCA therefore considers that they should have known that they were acting recklessly.

Sanctions

BHIM has been fined a penalty of £311,639 and the five individuals have been fined between £52,725 and £416,558 each and issued with prohibitions. FPL and HCA have both gone into liquidation and have therefore not been fined but instead issued with public censures. Had they not been in liquidation, FPL would have been fined £283,100 and HCA £239,900.

BHIM and the individuals have referred their Decision Notices to the Upper Tribunal, and the FCA's findings are therefore provisional and only reflect the FCA's beliefs as to what occurred and how it considers their behaviour should be characterised.

The Upper Tribunal will now determine the appropriate action to be taken, if any.

Compensation

As at 29 January 2019 the Financial Services Compensation Scheme had paid compensation of £26.8 million to 1,106 customers of FPL, HCA and BHIM and is investigating further claims. In total, 2,004 customers of the Firms invested approximately £76 million of their pension assets.

Protecting Members

Members cannot be prevented from transferring their pensions, but trustees can take steps to alert members to the potential risks involved.

The Pensions Regulator ("**TPR**") offers guidance for trustees in this regard, and considers it best practice to include its "Scamproof your Savings" leaflet (available on the TPR website) when sending annual statements to members and to anyone who requests a transfer. Trustees could go further and ask members who request transfers to provide information and answer questions about the scheme to which they are transferring, in order to ensure they fully understand what they are transferring to and have considered the risks.

Anna Giles, Trainee Solicitor – Pensions & Employee Benefits Team

THE MAGICIAN'S WAND – INVALID AMENDMENTS PUT RIGHT?

In this article Clive Weber reviews the recent interesting Court of Appeal judgment on 10 May 2019 in *BIC UK Limited v Burgess*. The Court concluded there was no legal magic wand available to rescue pension increases previously minuted and announced.

Timeline

1990/1992

Trustees' minutes and Member Announcement awarding pension increases for members' pre-6 April 1997 service ("Increases").

1993

New Deed and Rules retrospective to August 1990.

2011

The Employer, BIC UK Limited argues the Increases are invalid.

2018

High Court decides the Increases are *valid*.

2019

Court of Appeal unanimously disagrees with the High Court – the Increases are *not valid*.

Legal arguments

The scheme's 1991 Rules permitted amendments by deed, or by *"writing effected under hand by the Trustees and the Principal Employer"*. The trustees argued the 1991 Minutes were sufficient for this purpose or, if not, the maximum equity looks on that as done which should have been done cures the problem.

The High Court decided the 1991 Minutes were not valid amendments as they were signed by only one of the three trustees, and were not signed by the Principal Employer. This was accepted by the parties when the case reached the Court of Appeal.

The argument before the Court of Appeal focused on whether the 1993 Deed, which retrospectively introduced various powers such as to award increases, could also be treated as an exercise of those powers so as to validate the 1991 Increases.

Court of Appeal's approach

The Court accepted that the 1993 Deed and Rules retrospectively introduced the relevant powers which, had they existed in 1991, could have been used validly to introduce the Increases. However, there was no evidence of such powers having been exercised. The Court was not prepared to read in an exercise of the power: *"events which never took place cannot later be turned by magic into events which did in*

fact happen". The Court agreed that scheme provisions can be expressly altered retrospectively, but neither the 2003 Deed (nor the subsequent 2006 Deed) contained any express exercises of powers regarding the Increases.

The trustees pointed to the legal principle that in appropriate circumstances a *clear intention* to exercise a power, can itself be treated as an exercise of the power. But the Court of Appeal held firstly that the power must be a power existing at the time of its exercise and not under a power introduced retrospectively; and, secondly, the intention was incompatible with the terms of the 1993 Deed which provided only for increases to GMPs and not any further increases.

Wedlake Bell comments

A lot at stake here – the Increases being legally invalid reduced the scheme's member liabilities by some £5 million. Members being deprived of Increases (some 14 years after their award in some cases) is harsh. Especially when viewed against the background of the employer's intention – one wonders why there was not more focus on the employer being bound by its past intentions, and on its delay of some 18 years in raising objection. The scheme was administered from 1991 as if the Increases were valid and, it seems, the employer was aware of this throughout. Rather than the trustees seeking to bring the magic wand of retrospective amendments out of the tool box, one wonders whether legal principles relating to delay and estoppel would have been more productive from the trustees' and members' perspectives. As the Court of Appeal commented, it would have been open to the trustees and the principal employer to use their alteration power to validate the amendments had *"the Trustees and BIC UK directed their minds to the problem"*. This promotes the question whether there was a legal duty on both parties xto direct their minds much sooner to the problem and to have validated the Increases.

Clive Weber, Partner – Pensions & Employee Benefits Team

DEBENHAMS CVA TO PULL PENSION SCHEME OUT OF PPF ASSESSMENT PERIOD

Debenhams is the latest high street retailer to hit the headlines with financial struggles potentially affecting its pension scheme. At the time of writing, a Creditor's Voluntary Arrangement ("**CVA**") has been approved which, if completed, should pull the pension scheme out of the PPF assessment period it is currently in.

Administrators were appointed to Debenhams on 9 April 2019, followed on 10 April 2019 by the de-listing of Debenhams' ordinary shares from the London Stock Exchange. On 26 April 2019, the company proposed two CVAs (one relating to Debenhams Retail Limited, the main trading arm, and one relating to Debenhams Properties Limited). A Debenhams press release stated that "the CVA[s] [do] not seek to compromise claims of any creditors other than landlords, local authorities and inter-company liabilities. All trade suppliers and the entitlements of employees will continue to be paid in full…"

Terry Duddy, Executive Chairman of Debenhams, said "the issues facing the UK high street are very well known. Debenhams has a clear strategy and a bright future, but in order for the business to prosper, we need to restructure the group's store portfolio and its balance sheet... Our priority is to save as many stores and as many jobs as we can, while making the business fit for the future."

The Debenhams scheme entered a PPF assessment period when the CVA proposals were lodged. During an assessment period, the PPF determines whether the scheme has sufficient assets to meet its protected liabilities. If not, the scheme enters the PPF, meaning members face benefit caps and potential cuts to their pensions (i.e. PPF level benefits).

When a CVA proposal is lodged and a scheme enters a PPF assessment period, the PPF acquires the pension scheme's voting right as a creditor of the employer. The PPF's guidance on CVAs, published in June 2018, sets out its approach on exercising this voting right in situations where schemes are to be rescued and remain whole (as in the case of Debenhams):

- The PPF consults with TPR in all cases. The PPF will normally vote in favour of or against a proposal rather than abstain from voting, but the PPF's approach will depend on the purpose the CVA is trying to achieve.
- Some of the persuasive factors encouraging the PPF to vote in favour of a CVA include that:
  - the proposal should provide a significantly better return than an administration or liquidation and be proportionate considering the section 75 debt that is being eliminated;

- creditors are being treated equitably and the scheme is not being disadvantaged. In particular the PPF will look at connected and intra-group creditor positions; and
- all costs incurred by the scheme will be paid by the company including legal and financial advisor fees.

The PPF guidance makes clear that although the PPF will liaise with TPR in all cases, PPF agreement to a CVA does not imply clearance from TPR. Unless TPR has actually given formal clearance following an application by the employer (increasingly rare – only nine applications were made in 2015/2016 - but the number could rise with the introduction of the proposed strengthened voluntary clearance regime), then TPR's Anti Avoidance powers remain available.

The Debenhams CVAs were approved on 9 May by a margin "significantly above" the 75% threshold of creditors' votes needed for the arrangement to pass.

The Debenhams scheme is now set to leave its PPF assessment period as long as the CVA is completed successfully. Debenhams have stated that pensions are expected to be paid as normal during the CVA process.

Katie Whitford, Solicitor – Pensions & Employee Benefits Team

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