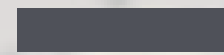
# THE PENSIONS COMPASS



SEPTEMBER 2018

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# INTRODUCTION

A lot has happened since our last edition of Pensions Compass in July, including the hottest summer ever recorded in England! The pensions and employee benefits industry remains just as sizzling, and our September edition of Pensions Compass includes the following:

- Clive's regular Ready Reckoner update;
- An update on the BA saga from Clive and Katie;
- Grace's insight into pension scheme investments in fracking;
- My update on master trusts;
- Katie's update on the buyout of c. 9,000 BHS Pension Scheme Members' benefits; and
- Grace's summary of the PO decision concerning a fraudulent transfer of benefits.

Alison Hills, Partner and Editor-in-Chief

# PENSIONS READY RECKONER

**PARLIAMENT**

| Recent Legislation | Enacted | Effect |
|---|---|---|
| Data Protection Act 2018 | 23/05/2018 | Enacts the EU General Data Protection Regulations, including permitted changes and post Brexit provisions for data sharing. |
| Data Protection (Charges and Information) Regulations 2018 | 10/04/2018 | Enacts the EU General Data Protection Regulations, including permitted changes and post Brexit provisions for data sharing. |
| Contracting-out Regulations re bulk transfers of members, 2018 | 26/02/2018 into force 06/04/2018 | Facilitates bulk transfers of members with contracted-out rights without their consent, to schemes that have never been contracted-out. |
| Preservation of Benefit Regulations 2018 | 22/02/2018 into force (mainly) on 06/04/2018 | Simplifies bulk transfers between DC schemes and extends charge cap protections to members transferred without consent. |
| Appropriate Independent Advice Regulations, 2018 | Into force 06/04/2018 | Extra 'risk' warnings for transfers of certain types of DC benefits with DB element. |
| Finance Act 2018 | 06/04/2018 | New HMRC scheme registrations to be through only active companies. |

## PARLIAMENT

| Forthcoming legislation – future effective dates | Effective Date | Effect |
|---|---|---|
| Pension Schemes Act 2017 | Majority of provisions come into effect on 01/10/2018 | Regulation of master trusts. ***See article*** |
| Amendments to Pension Schemes Act 1993 sections 93 to 101 re statutory right to transfer | 01/10/2018 | To help prevent pension scams, the statutory right to transfer is to be tightened regarding permitted recipient pension schemes. |
| Multi-Employer Pension Schemes Bill – Private Member's Bill | Second reading due 26/10/2018 | The Bill seeks to ease the Section 75 debt burden on unincorporated employers. However, it seems the Government considers the present legislation sufficiently flexible (including the debt deferral provisions which came into force on 06/04/2018) so this Bill is unlikely to progress. |
| Financial Guidance and Claims Act 2018 | Royal Assent 10/05/2018, expected operational date Autumn 2018 | The new publicly funded guidance service combining the Money Advice Service, Pensions Advisory Service and Pensions Wise is expected to operate from Autumn 2018. |
| Divorce (Financial Provision) Bill | Second Reading 11/05/2018 | The Bill is aimed at limiting judicial discretion on divorce by specifying equal division as the fair starting point for property and pensions acquired by a couple after marriage as equal division. |

## FROM THE COURTS

| Topic | Recent decisions |
|---|---|
| Exercising Trustee powers<br>*British Airways v British Airways Trustees*<br>Court of Appeal<br>05/07/2018 | The Court of Appeal has decided in favour of BA, reversing the High Court's decision in May 2017. WB comment: a very important decision on the exercise of Trustee powers – please see the detailed article on ***page 12*** of this issue of Pensions Compass. ***Stop-press:*** on 12 September 2018 the BA Trustees announced they will appeal to the Supreme Court against the Court of Appeal's decision. It is anticipated the Supreme Court hearing will be in the second half of 2019. |
| Entitlement to widowed parent's allowance ("WPA")<br>*McLaughlin*<br>Supreme Court 30/08/2018 | In these Judicial Review proceedings, the Supreme Court by a 4 to 1 majority decided that the relevant provisions of the Northern Ireland legislation were incompatible with the European Convention of Human Rights, and so the WPA was payable. |
| HMRC: loans as unauthorised payments – tax charges<br>*Bella Figura Ltd v HMRC*<br>First Tier Tax Tribunal<br>20/06/2018 | This First Tier Tribunal decision underlines the complexity of the tax assessment rules. HMRC's power to issue 'discovery' tax assessments where HMRC are outside the usual time limit does not, according to this First Tier decision, apply to the "scheme sanction charge". Here the scheme had made "unauthorised payments" namely loans in breach of regulations. The Tribunal decided that scheme sanction charges had not been included within Section 29 Taxes Management Act 1970 by amendments made by the 2005 Tax Assessment Regulations – this meant HMRC could not use "discovery" assessments to impose a scheme sanction charge.<br>The above finding prevented HMRC taxing one of the loans. The Tribunal found that other loans made and taxed under ordinary tax assessments were taxable. The taxpayer argued the relieving provisions of section 268 FA 2004 applied as it was reasonable of the taxpayer to believe the loans were not taxable and it was just and reasonable to relieve the taxpayer of the tax charges. The First Tier rejected both arguments and upheld the scheme sanction charges on these other loans. |

## FROM THE COURTS

| Topic | Recent decisions |
| --- | --- |
| HMRC: circumstances in which scheme sanction charge can be discharged under section 268 FA 2004<br>*Crossfield v HMRC*<br>First Tier Tax Tribunal 20/06/2018 | Unauthorised loans were made by the pension scheme. In this further section 268 case (see also the Bella Figura decision mentioned above), the First Tier Tribunal examined whether the trustee's belief that the loans were in order was reasonable and concluded it was not. The Tribunal also concluded that the taxpayer had not shown it would be just and reasonable to discharge the scheme sanction and other tax charges. The Tribunal emphasised that the test for applying the relieving provisions of section 268 is strict; the purpose of the scheme sanction charge is to recoup tax relief given on contributions to a scheme where those contributions have in effect been used for purposes other than that for which tax relief was given – here the contributions were used by the scheme to make unauthorised loans. |
| "Worker" classification<br>*Pimlico Plumbers v Smith*<br>Supreme Court 13/06/2018 | The Supreme Court considered whether on the particular facts the individual plumber, Mr Smith, was self-employed (as Pimlico Plumbers contended) or was an employee or worker under the Equality Act. It decided Mr Smith was a 'worker' and therefore had certain rights under the Equality Act. OUR COMMENT: although these cases tend to be fact specific, the Supreme Court's views on the tests to be applied are of interest, including in the context of the duty to auto-enrol. |
| TPR's powers<br>Fit and proper person to be a Trustee – civil or criminal standard of proof?<br>*McLarry v TPR*<br>Upper tribunal of High Court 16/07/2018 | Under Pensions Act 2004 TPR has power to prohibit a person from being a trustee where they are not a fit and proper person. TPR alleged the 2 trustees had acted dishonestly and without integrity. The trustees argued the criminal standard of proof should apply – beyond reasonable doubt – and not the civil standard of balance of probabilities. The Upper Tribunal decided, in line with the FCA's power to prohibit persons acting, that the correct standard of proof was the civil standard of balance of probabilities. |

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

## FROM THE COURTS

| Topic | Forthcoming important decisions |
| --- | --- |
| Sex equality – GMPs<br>*Lloyds Banking Group*<br>High Court | This GMP equalisation claim by female employees of Lloyds Bank was heard in July 2018 and Judgment is awaited. The issues are whether benefits must be equalised for the effect of GMPs and, if so, how. Whatever decision the High Court reaches, appeals to higher Courts are likely. |
| Inheritance tax and pension transfers<br>*HMRC v Parry* (the 'Staveley' case)<br>Court of Appeal | Case heard on 6 and 7 June 2018, Judgment awaited. Whether IHT payable on transfer of pension funds is the issue. 'Staveley' is on its own facts but the Judgment is likely to be of general interest bearing in mind the significant increase in DB to DC transfers to access the DC flexi-access regime. |

## FROM THE COURTS

| Topic | Forthcoming decisions |
| --- | --- |
| Discrimination based on disability<br>*Williams v Trustees of Swansea University Scheme*<br>Court of Appeal 14/07/2017 | Supreme Court hearing expected October 2018. Issue: whether in the circumstances using part-time salary rather than full-time equivalent is unlawful discrimination. |
| Discrimination based on age<br>*Sargeant v London Fire Authority*<br>Employment Appeal Tribunal 29/01/2018 | Court of Appeal Hearing due 5 November 2018. Issue: whether the transitional pension arrangements are discriminatory on grounds of age, or objectively justifiable. |

## FROM THE COURTS

| Topic | Forthcoming decisions |
|---|---|
| Discrimination based on age<br>*Lord Chancellor v McCloud*<br>Employment Appeal Tribunal 29/01/2018 | Court of Appeal hearing due 5 November 2018. Issue: whether transitional pension arrangements regarding certain Judges who were members of the Judicial Pension Scheme are unlawful as age discriminatory and, in some cases, discriminatory on grounds of race and sex discrimination. |
| RPI/CPI<br>*Barnardo's v Buckinghamshire*<br>Supreme Court 11/06/2018 | Issue: whether the scheme trustees have power to substitute CPI (or some other index) for RPI as the employer contended. The High Court and Court of Appeal (by 2:1 majority) rejected this. The Supreme Court's decision is awaited. The Supreme Court apparently decided not to hear argument on whether, if there is a power to switch index, exercising the power would contravene members' subsisting rights under section 67. |
| RPI/CPI<br>*BT Telecommunications v BT Pension Trustee*<br>High Court 19 January 2018 | Yet another RPI/CPI case, this time relating to whether RPI has ceased to be published "or becomes inappropriate". The High Court decided neither was the case. Court of Appeal hearing due on 9 October 2018. |
| Overpayment of pension<br>*Burgess v BIC UK Ltd*<br>High Court 17 April 2018 | Issues: whether a limitation period applies to limit the past period for equitable recovery of overpayments, and whether a County Court Order is required to enforce such recovery. The High Court considered no limitation period applies but that a County Court Order is needed to enforce recovery. The appeal to the Court of Appeal on both aspects will be heard in 2019. |
| TPR's anti-avoidance powers<br>*Box Clever (ITV)*<br>Upper Tribunal 18 May 2018 | The Upper Tribunal decided in favour of TPR regarding the scope of TPR's anti-avoidance powers in the context of joint ventures. ITV's appeal from the Upper Tribunal's decision is due to be heard by 11 June 2019. |

## PENSIONS OMBUDSMAN ("PO")

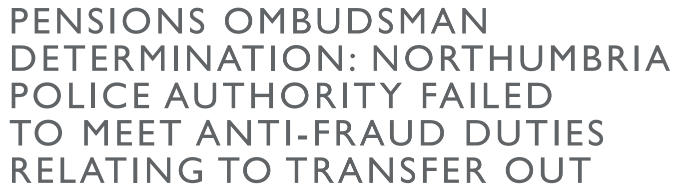
| Topic | Effect |
|---|---|
| Transfer by Police Pension Scheme to another scheme – pension scam<br>Re Mr N<br>PO Decision 11/07/2018 | The PO ordered the reinstatement of Mr N's pension benefits as he considered the failure to carry out adequate checks on the recipient scheme amounted to maladministration. £1,000 awarded to Mr N for his significant distress and inconvenience. |
| Employer's failure to bring forward retirement date before member's death<br>Re Mr Y<br>26/07/2018 | In what some may see as a harsh decision, the PO decided that on the facts the employer should have advanced Mr Y's retirement date so that enhanced death benefits would have been paid on Mr Y's death. The decision underlines the importance of administrators making a contemporaneous note of telephone calls from members/their family members. |

## DEPARTMENT OF WORK AND PENSIONS

| Topic | Effect |
|---|---|
| DWP Consultation on "A Stronger Pensions Regulator" | The Consultation opened in June 2018 and closed on 21 August 2018. New Regulations are likely later this year broadening employer duties to notify TPR of various corporate events. TPR is also likely to revise its Clearance Guidance for transactions. |

## DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY ("BEIS")

| Topic | Effect |
|---|---|
| BEIS Response following Consultation on Insolvency and Corporate Governance | In its response published on 26 August 2018, BEIS proposed amongst other matters to strengthen the framework for paying dividends and to ensure greater accountability of directors in group companies selling distressed subsidiaries – resonating with concerns of trustee boards of DB pension schemes in deficit. However, when if it all, Government will find time to legislate given BREXIT is unclear. |



# PENSIONS OMBUDSMAN DETERMINATION: NORTHUMBRIA POLICE AUTHORITY FAILED TO MEET ANTI-FRAUD DUTIES RELATING TO TRANSFER OUT

**Summary**

This determination involved Mr "N" who transferred his pension pot from the Police Pension Scheme ("**PPS**") to the London Quantum Scheme ("**LQS**") in 2014.

(Note that LQS is not associated with Quantum Advisory)

LQS is now being investigated for pension liberation fraud and Mr M may have lost his pension savings by transferring to LQS. Mr N complained that the Northumbria Police Authority (the "Authority") transferred his pension pot to a new pension scheme without providing the necessary checks in relation to the receiving scheme, and failed to provide him with sufficient warning as required by the Pensions Regulator.

**Background**

Mr N sought independent financial advice in relation to transferring his pension pot. In August 2013, Mr N contacted Pension Transfer UK. He later received a call from a company called Viva Costa International, an unregulated introducer of work to independent financial advisers. Mr N was then referred to Gerard Associates Limited, which then recommended that he transferred his pension pot to LQS.

**Determination**

The Pensions Ombudsman held that the Authority failed to: conduct adequate checks and enquiries in relation to Mr N's new pension scheme; send Mr N the Pensions Regulator's transfer fraud warning leaflet (often referred to as the Scorpion leaflet); and engage directly with Mr N regarding the concerns it should have had with his transfer request, had it properly assessed it. This amounted to maladministration. It was held that on the balance of probabilities, but for the Authority's maladministration, Mr N would not have proceeded with the transfer and suffered this loss. To make matters worse, the sole sponsoring employer of London Quantum is now in liquidation.

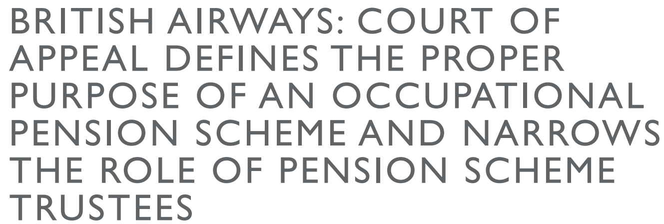
The Authority has since been ordered by the Pensions Ombudsman to reinstate Mr N's accrued benefits of £124,000 in the scheme or to provide equivalent benefits, adjusting for any revaluation that has arisen since the transfer (less any amounts later recovered from LQS). In addition, the Authority was also ordered to pay Mr N £1,000 for the inconvenience and materially significant distress suffered as a consequence of the transfer being handled incorrectly by the Authority.

**Wedlake Bell comment**

Some have argued that decisions such as this reiterate the importance of the role of the scheme and its trustees and the scheme's responsibility to alert members to the risks related to pension liberation scams, and to ensure that trustees of schemes perform proper checks on receiving schemes in a transfer. More importantly, it shows that where the scheme trustees have done little to appease the victim, the victim could still get redress if the Ombudsman thinks that the trustees did not act in a reasonable way to protect the member. This was the opinion of Royal London director of policy, Steve Webb. To him, this ruling was an important one and demonstrates that pension schemes have important duties to protect members.

Although it is important for trustees of pension schemes to protect members' best interests and do what is right in fulfilling their fiduciary duties (such as asking the right questions, taking into consideration relevant factors, and acting reasonably), in my opinion this determination was extreme and some would argue that it was unfair on the Authority. Although the Authority did not send the fraud warning leaflet directly to Mr N, it had put a copy on its intranet site previously, which provided Mr N with access to it. Furthermore the authority was criticized for not dealing with Mr N directly. Mr N, however, was advised by an IFA and signed a form to enable the authority to deal with the IFA. Most importantly Mr N admitted that he trusted the IFA and he did not read the documents that he signed. It may also be the case that he would not have read other warnings or fraud leaflets also provided to him by the Authority. It is, therefore, questionable whether all blame should be attributable to the Authority and whether it should have been held that its actions (or lack of) were responsible for Mr N's decision to transfer out. Although what happened to Mr N was very unfortunate, and it caused him a great deal of distress, the authority in this case seemed to be the scapegoat in place of LQS, which is now in liquidation.

Grace Ho, Solicitor – Pensions & Employee Benefits Team



# BRITISH AIRWAYS: COURT OF APPEAL DEFINES THE PROPER PURPOSE OF AN OCCUPATIONAL PENSION SCHEME AND NARROWS THE ROLE OF PENSION SCHEME TRUSTEES

British Airways ("**BA**") has successfully appealed against the BA pension scheme Trustees' award of pensions increases. The Court of Appeal reversed the High Court decision in favour of the Trustees by a two to one majority. We discussed the High Court judgment in our June 2017 edition of ***Pensions Compass***.

## Recap

The BA litigation concerns the exercise of a unilateral power of amendment by the Trustees, in response to the scheme's change from RPI to CPI-based increases in line with public sector schemes in 2010. This change was forced on the scheme because of the particular wording of the scheme rules which stemmed from the scheme's public sector origins.

Under their unilateral powers, the Trustees introduced:

- a duty for the Trustees to review the scheme's pension increases annually; and
- a unilateral power to award additional discretionary increases on top of the statutory-based increases required under the scheme rules.

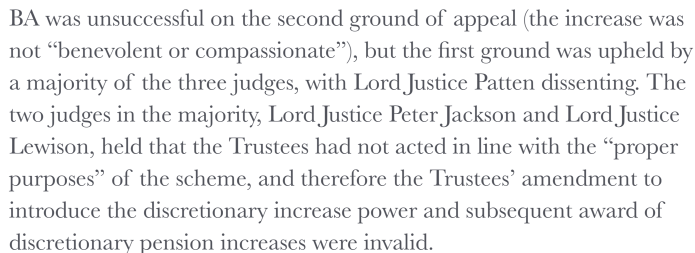
The Trustees then awarded members a discretionary pension increase of approximately half the difference between RPI and CPI (0.2% in 2013).

The High Court held the Trustees had exercised their powers properly and had not acted unreasonably.

## Appeal to the Court of Appeal

BA's appeal concerned two particular aspects of the High Court judgment. It argued that:

- the introduction of the discretionary increase power was beyond the scope and contrary to the purpose of the scheme's power of amendment; and
- the discretionary increase was a "benevolent or compassionate" payment and therefore prohibited by the scheme's objects clause.



BA was unsuccessful on the second ground of appeal (the increase was not "benevolent or compassionate"), but the first ground was upheld by a majority of the three judges, with Lord Justice Patten dissenting. The two judges in the majority, Lord Justice Peter Jackson and Lord Justice Lewison, held that the Trustees had not acted in line with the "proper purposes" of the scheme, and therefore the Trustees' amendment to introduce the discretionary increase power and subsequent award of discretionary pension increases were invalid.

The Trustees' *method* of decision-making (an area of law which is the subject of much litigation) was in fact not called into question in the Court of Appeal. Lord Justice Patten noted that the High Court found the Trustees had balanced the interests of the employer against those of the employees or former employees and had taken the funding implications into account. This was not the subject of BA's appeal.

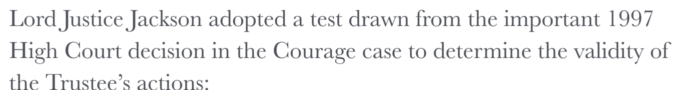
Where the Trustees fell foul (according to the majority of the Court of Appeal) was in relation to whether the Trustees were acting beyond the purposes of the scheme and therefore not entitled to make those decisions in the first place.

**Proper purposes: scope of the Trustees' amendment power**
The scheme's power of amendment, exercisable only by the Trustees, contained a caveat that no amendment could be made which *"would have the effect of changing the purposes of the scheme"*. The Court of Appeal therefore had to consider whether the Trustees' actions had changed the purposes of the scheme and breached this caveat. This involved first finding what the purposes of the scheme really were.

The scheme rules helpfully contained an objects clause which provided that the main object of the scheme was *"to provide pension benefits on retirement… The scheme is not in any sense a benevolent scheme and no benevolent or compassionate payments can be made therefrom"*. The Trustees argued that this objects clause set out the purpose of the scheme, and the discretionary increase power fell within these boundaries.

BA argued that the Court shouldn't limit itself to looking at the scheme rules to discern the purpose, but should consider a wide variety of materials and factors, including the business context of occupational pension schemes and the funding level of the BA scheme. BA's position was that the Trustees had taken on a role akin to a trade union to improve members' benefits, going beyond their proper role to administer the scheme to fulfil the purpose of delivering promised benefits.

If the Trustees' decisions were upheld, BA argued that it would be forced into paying additional contributions *"not for the purpose of funding benefits already promised but for funding additional benefits decided upon by the Trustees"*.



Lord Justice Jackson adopted a test drawn from the important 1997 High Court decision in the Courage case to determine the validity of the Trustee's actions:

- Were the Trustees' actions required *"by the exigencies of commercial life"*?

He found that they were not, and agreed with BA that the Trustees had effectively added the role of paymaster to their duties. However, it was central to this finding that the scheme was in deficit. Had the scheme been in surplus, the decision may well have been in favour of the Trustees.

Unusually, Lord Justice Patten's dissenting judgment is the longest and most closely reasoned of the three judgments, taking up about two thirds of the written decision. We understand that the Trustees have been granted permission to appeal to the Supreme Court and we can see plenty of scope for debate on both sides – indeed the judiciary itself is split.

It is very unusual for scheme trustees to have power to amend unilaterally. Nonetheless, the discussion in the Court of Appeal judgment of a scheme's "proper purposes" is important to all occupational schemes. Even where powers are vested jointly in the employer and the trustees, trustees still need to take into account the "proper purposes" of the scheme in their decision making. We eagerly await the next instalment in the Supreme Court – probably next year!

Clive Weber, Partner – Pensions & Employee Benefits Team
and Katie Whitford, Solicitor – Pensions & Employee Benefits Team

# INSOLVENCY AND DIRECTORS DUTIES: CHANGE IS COMING…

On 26 August 2018 the Department for Business, Energy and Industrial Strategy ("**BEIS**") published the Government's response to the consultation on measures designed to improve corporate governance within companies which are in or approaching insolvency.

A string of prominent pre-pack insolvency arrangements whereby pension schemes are off-loaded to the Pension Protection Fund ("**PPF**") whilst at the same time permitting struggling businesses to be sold have led many to comment that action is needed sooner rather than later to prevent continued abuse of the PPF.

With the House of Fraser's pension schemes due to enter the PPF's assessment period after the company was purchased as part of a pre-pack this topic is under the spotlight more than ever before.

### Crackdown on reckless directors

A press release from BEIS on the same date as the consultation response entitled "Crackdown on reckless directors" confirms that:

- boardrooms will be expected to explain to shareholders how they can afford to pay dividends alongside capital investment, workers' rewards and pension schemes;
- struggling companies will be given more time to try to rescue the business and help safeguard jobs; and
- directors who have dissolved companies to avoid paying workers or pensions could be disqualified or fined by regulatory authorities for the first time.

These and other measures designed to protect workers and small suppliers will be set out in further detail in the autumn.

### Role of the Pensions Regulator

Many in the industry are hoping that the Pensions Regulator will be given enhanced powers to ensure that where there is a material scheme deficit, the payment of dividends or the sale of a company will not jeopardise the solvency of the fund. One suggestion in the consultation response is that where there is a deficit, directors should have to make a statement before declaring a dividend that the company will continue to be able to comply with the terms of any contribution agreement negotiated with the trustees.

The idea of providing fuller disclosure of details of a deficit reduction plan was also floated – this would go some way to providing stakeholders with useful additional information with which to hold management to account for decisions on pay out policy.

**Wedlake Bell comment**

As the title to this piece states – "change is coming". This consultation follows hot on the heels of this years' White Paper "Protecting Defined Benefit Pension Schemes" (March 2018) and "The Protecting Defined Benefit Pension Scheme – A Stronger Pensions Regulator" consultation (June 2018). Measures to ensure there are clearer funding standards for all pension schemes and that the Pensions Regulator has enhanced powers to obtain the right information when it is needed and new powers to strengthen existing safeguards are on their way, and the majority will say, rightly so. However, any new measures must also be balanced to ensure that legitimate commercial transactions are now unduly hampered by restrictive pensions red tape. Watch this space.

Justin McGilloway
Partner and Head of Pensions & Employee Benefits Team

# LOCAL AUTHORITY PENSION FUNDS INVESTING MORE THAN £9 BILLION IN THE GLOBAL FRACKING INDUSTRY


### Summary

New data and reports have suggested that local authority pension funds across the UK have invested over £9 billion in the international fracking industry. News about this has come as the topic of fracking was recently removed from the government's quarterly public attitude survey, commissioned by the Department for Business, Energy and Industrial Strategy, just days after the government gave the go-ahead to frack for the first time in seven years. The first hydraulic fracture in the UK (since 2011) could be happening anytime now.

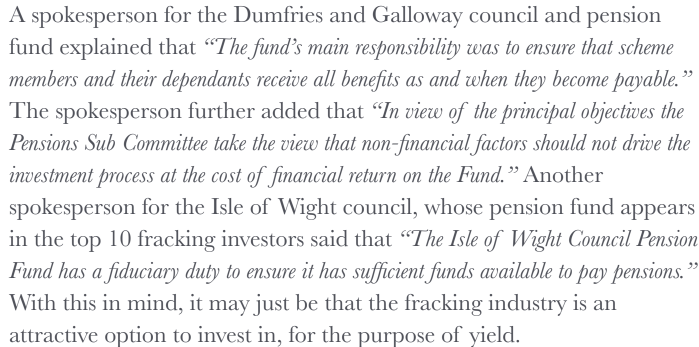

### The problem with fracking…

Fracking is controversial, with many UK citizens and residents objecting to any plans for fracking in their local areas. Government polling and surveys across the UK have shown little support in fracking. Deirdre Duff, divestment campaigner with Friends of the Earth has stated that *"UK councils should know better than to invest in fracking companies. These companies are inflicting their fracking operations on communities around the world, and this can have significant impacts" and that "Many UK councils have rightly opposed fracking in their own area – however it is shocking that they still support the global fracking industry. We should remember too that the climate change caused by fracking will affect us all, no matter where the fracking is conducted."*

Some may, therefore, feel opposed to having their pension pots invested in such an industry. Despite this, UK pension funds have still invested over £9 billion into the fracking industry, with the Greater Manchester Pension Fund investing the largest amount (almost £1billion), and West Yorkshire Pension Fund investing over half a billion. The councils with the highest percentage of their pension funds invested in fracking are: Dumfries and Galloway; Greater Manchester; and the London Borough of Merton (each with around 6-7 percent of the total pension fund invested in fracking companies).

### Pension funds' reasons for investing in fracking

From the pension schemes and the scheme trustees' perspective, one of their main fiduciary roles is to ensure that the fund is looked after and that the members of the scheme receive their benefits on retirement. One of the ways to ensure this is to invest properly. Scheme trustees obtain advice in relation to legal, actuarial and investment matters, and so decisions in relation to investments are not done so lightly. An investment report is usually produced with the investment adviser explaining why certain options should be invested in, which takes into account risks and potential yield. Trustee meetings would include discussions on investment (and other) matters, and minutes would also be taken to show the trustees' thought process, prior to any decisions being made and to record decisions.



A spokesperson for the Dumfries and Galloway council and pension fund explained that *"The fund's main responsibility was to ensure that scheme members and their dependants receive all benefits as and when they become payable."* The spokesperson further added that *"In view of the principal objectives the Pensions Sub Committee take the view that non-financial factors should not drive the investment process at the cost of financial return on the Fund."* Another spokesperson for the Isle of Wight council, whose pension fund appears in the top 10 fracking investors said that *"The Isle of Wight Council Pension Fund has a fiduciary duty to ensure it has sufficient funds available to pay pensions."* With this in mind, it may just be that the fracking industry is an attractive option to invest in, for the purpose of yield.

**Wedlake Bell comment**

Although the above is true, some may argue that with such a variety of investment opportunities available, fracking need not be the chosen investment option, especially if members do not really know or understand what the fund is being invested in.

For those members who may feel very strongly against fracking and whose pension pots are invested in such an industry, this does not seem right. Considerations for trustees in making such decisions would include the investment regulations, social and environmental factors and a need to trustees to consider the sustainability of their investment decisions. Non-financial factors should, indeed, not drive the investment process or final decision, especially from a trustee's point of view.

However, with climate change and environmental pollution and damage becoming more relevant than ever, is it really justifiable to invest in such a damaging industry (for the environment, and our and future generations) for the purpose of getting a better return? In my opinion fracking is a topic that should be taken seriously and should not be supported or encouraged, though, as a driver who regularly purchases her petrol from one of the world's leading oil and gas companies (which has profited from its several international fracking projects), am I also indirectly supporting the industry?

Grace Ho, Solicitor – Pensions & Employee Benefits Team

# TPR WARNINGS ABOUT MASTER TRUSTS

On 1 October 2018 legislation which regulates UK master trusts is due to come into force. From 1 October, in order to continue operating, a master trust will either:

- need to have ***obtained*** master trust authorisation from the Pensions Regulator; or
- in the case of an existing master trust, need to have already ***applied*** for authorisation from the Pensions Regulator (schemes which existed prior to 1 October 2018 have a six month period in which to apply for authorisation, failing which they will need to close).

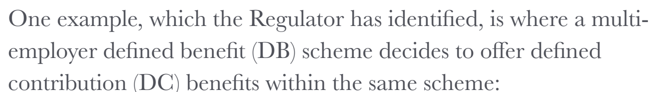
The authorisation process is not simple (or cheap) as master trusts must satisfy a number of hurdles in addition to paying an application fee of £41,000.

If you operate a master trust you will need to demonstrate that the scheme meets the required standards across the following criteria:

1. **Fit and proper**: all the people who have a significant role in running the scheme can demonstrate that they meet a standard of honesty, integrity and knowledge appropriate to their role.
2. **Systems and processes**: IT systems enable the scheme to run properly and there are robust processes to administer and govern the scheme.
3. **Continuity strategy**: there is a plan in place to protect members if something happens that may threaten the existence of the scheme, including how a master trust will be wound up.
4. **Scheme funder**: any scheme funder supporting the scheme is a company (or other legal person) and only carries out master trust business.
5. **Financial sustainability, including business plan**: the scheme has the financial resources to cover running costs and also the cost of winding up the scheme if it fails, without impacting on members.

This is all well and good for those schemes set up to be "master trusts", however, there is a significant risk that:

- some schemes which never intended to be "master trusts" fall within the statutory definition and therefore must satisfy the requirements which apply to master trusts; and
- some schemes which do not currently qualify as master trusts might inadvertently fall within the statutory definition at some point in the future due to changes made to benefits and or structure of the scheme.



One example, which the Regulator has identified, is where a multi-employer defined benefit (DB) scheme decides to offer defined contribution (DC) benefits within the same scheme:

> *"Any occupational pension scheme which provides money purchase benefits for unconnected employers and is not a public service pension scheme will be classed as a master trust under the legislation."*

> *"We encourage trustees to approach TPR if they are considering carrying out any changes which may lead a scheme to fall under the master trust definition after the commencement date on 1 October 2018, as they will need authorisation before making the changes to continue to operate in the market."*

Such a scheme would immediately become a master trust upon this change being made, as such there is scope for many employers and trustees to get a nasty shock if they are not properly advised before making such changes. The Regulator has warned that they may order such schemes to be wound-up.

Indeed, we have had direct experience of some multi-employer schemes for unconnected employers and significant changes have had to be made by the employers and trustees of those schemes to ensure they didn't need to comply with the new requirements which apply to master trusts. Several employers have taken the decision to wind-up these schemes and replace them with contract-based arrangements for future service.

The key message here is that Trustees and Employers need to think carefully before implementing changes to the benefits or structure of their schemes in order to avoid the risk of being ordered to wind-up their schemes.

Alison Hills, Partner – Pensions & Employee Benefits Team

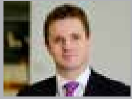
# £800M BUYOUT OF NEW BHS PENSION SCHEME

Pensions Insurance Corporation has announced an £800m buyout of the new BHS pension scheme, BHS2, on 12 August. BHS2 members were approximately 9,000 BHS pension scheme members who did not take a cash lump sum or transfer to the PPF, opting to transfer to the new sponsorless scheme under the terms offered by the predecessor BHS schemes.

This buyout represents a more secure position for the membership, guaranteeing the BHS2 benefits in full. The news comes against the backdrop of a predicted record-breaking year for the bulk annuity market. Hymans Robertson predict pension scheme buy-in and buy-out volumes to reach a record £18bn in 2018, the result of a combination of attractive pricing by insurers and de-risking following recent improved funding levels.

Trustees and employers of schemes which are moving towards a buy-out or bulk buy-in in the near future should be aware of steps they can take to ensure their scheme is well placed in the current market conditions. Carrying out a scheme documents “health check” and putting together a benefit specification is an important first step and will allow trustees to identify potential issues and stumbling blocks at an early stage. Insurers are likely to favour well-prepared schemes as it will lead to a more straightforward transaction, and getting this preliminary housekeeping underway as early in the process as possible will allow trustees to watch market movements and time their approach to insurers. Equally important is having the right team of advisers on board who can guide trustees through the many technicalities inherent in the process – a factor which helped to secure the BHS2 benefits sooner than had been anticipated.

Katie Whitford, Solicitor – Pensions & Employee Benefits Team



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