SLAUGHTER AND MAY

# Pensions Bulletin

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Legal and regulatory developments in pensions

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# New law

## I. Financial Guidance and Claims Act 2018

1. Trustees of schemes providing flexible benefits should note that there will be a change to the law requiring them to ensure that 'relevant beneficiaries' with a right or entitlement to flexible benefits, and who have applied to transfer out or to start receiving benefits, have received guidance or opted out of receiving it.

2. The Financial Guidance and Claims Act 2018 establishes a single financial guidance body which is expected to come into operation later in 2018.

3. The new body's remit is to include a pensions guidance function offering the public "free and impartial information and guidance on matters relating to occupational and personal pensions". The Act specifically refers to members and survivors being helped to reach decisions about their flexible benefits.

   **Comment:** Flexible benefits are money purchase benefits, cash balance benefits, or other types of benefit calculated by reference to an amount available for the provision of the benefit (whether calculated by reference to contributions by or in respect of the member or any other factor).[1]

4. The Secretary of State will have to make regulations requiring trustees to ensure that 'relevant beneficiaries' with a right or entitlement to flexible benefits and who have applied to transfer out or to start receiving benefits:

   - are referred to 'appropriate pensions guidance' and provided with an explanation of the nature and purpose of that guidance; and
   - receive that guidance, unless the individual concerned has opted out of receiving it.

   **Comment:** Trustees may wish to consider whether their scheme literature ought to be amended to refer to this new requirement, once the regulations are made. Systems will also need to be set up to ensure that trustees comply with the legislation.

5. The Act also states that the Secretary of State may make regulations prohibiting pensions cold calling.

# Cases

## II. Ruling on FSD legislation and on trustee decisions contemplating PPF

### A. Overview

1. Employers linked to DB schemes will be interested in an Upper Tribunal decision commenting on the

[1] Section 74 of the Pension Schemes Act 2015.

application of the Pensions Regulator's moral hazard power to issue Financial Support Directions ("**FSDs**"). The decision pushes for a purposive and wide interpretation of the legislation governing FSDs.

2. The commentary on retroactivity raises an interesting comparison with the DB pensions White Paper proposal concerning punitive fines.

3. Trustees may wish to take particular note of the Upper Tribunal's commentary on trustees taking account of the availability of the PPF when reaching decisions.

## B. *Facts*

1. In 2012 Pensions Regulator published a Determination Notice confirming the issue of an FSD to 5 companies (the "**Targets**"), in relation to the Box Clever Pension Scheme (the "**Scheme**").

2. The Scheme was established as part of a joint venture ("**JV**") between the Granada and Thorn groups, providing defined benefits for former active members of the Granada and Thorn pension funds employed in the JV.

3. The Box Clever business was sold to a private equity buyer in 2005. Administrative receivers subsequently reorganised the group.

4. The Regulator found that the Targets were "associated" with the scheme's participating employers by virtue of their control of the voting power in the employers and concluded that it was therefore reasonable to issue the FSD, having regard to the value of the benefits received by the Targets from the JV.

5. To read about the extensive proceedings to date in this litigation, please see Pensions Bulletin 16/18.

## C. *Decision*

The Upper Tribunal (Tax and Chancery) supported the Regulator's decision to issue the FSD.

<u>Association test met</u>

1. The Targets were associates of the employers because their voting rights in respect of the employers meant that they controlled them within the meaning of Section 435 of the Insolvency Act 1986, and therefore fell within the scope of the FSD regime under the Pensions Act 2004 (Section 43(6)(c)).

2. A potential recipient of an FSD need only be associated with one of the employers for the requirements of Section 43(6) to be satisfied.

<u>Events before Section 43 was introduced are in scope</u>

1. When deciding whether it would be reasonable to issue an FSD, the Regulator could take account of events which occurred before Section 43 came into force. Section 43 was not retroactive legislation and did not, therefore, fall foul of the presumption against retrospectivity. It imposed new financial obligations prospectively, without altering the legal effect of transactions already entered into.

2. In view of this, the Upper Tribunal also rejected the Targets' argument

that their right to peaceful enjoyment of their possessions under Article 1 Protocol 1 of the European Convention of Human Rights precluded an FSD being issued by reference to events which occurred before the legislation came into force.

**Comment:** An interesting comparison on this might be drawn in relation to the White Paper proposal for punitive fines to penalise the targets of a contribution notice, possibly applied retroactively to acts or omissions after the date of the White Paper (19th March, 2018). It is unclear how that proposal would operate and what the amount would be, although a 2016 report on DB schemes issued by the Work and Pensions Select Committee suggested punitive fines trebling the original demand. To see our client briefing on the White Paper please click here.

<u>FSD pursuit of some entities but not others</u>

1. The Regulator had provided a comfort letter to the other parent to the JV (referred to as **'Carmelite'** in the ruling), promising not to issue a contribution notice or an FSD. The Regulator did this because it regarded Carmelite's control of the employers as having ended when the administrative receivers were appointed.

2. When one of the other targets sought similar comfort the following year, however, the Regulator declined, having changed its mind on the 'control' point in the intervening period. Despite the change of mind, the Regulator did not pursue Carmelite.

3. The Regulator was not required to pursue every person who at the relevant time fell within Section 43(6).

4. The Upper Tribunal noted that it was not surprising that the Regulator had focused its limited resources on one group of financially stable potential targets while holding back from pursuing another.

**Comment:** The reference to the Regulator's resources is an aside but interesting to note in the light of recently announced plans to increase those resources (please see item III below).

<u>Moral hazard – conduct and clearance</u>

1. The FSD legislation sets out the test to be met, without any implied, additional criterion concerning conduct.

2. Equally, the absence of any clearance regime when arrangements for the JV were being devised did not prevent the Regulator from issuing an FSD.

<u>Reasonableness of imposing an FSD</u>

1. The legislation required the Regulator to decide whether it would be reasonable to impose an FSD. In doing so it must consider whether the interference with the potential targets' property rights caused by an FSD was justified in all the circumstances.

2. The FSD regime was not fault based but there was an important distinction to be drawn between blame and responsibility.

3. The Targets could not have known when setting up the JV that further liabilities could be imposed as a result, and they had no opportunity to seek clearance. These were significant factors tending against the issue of an FSD, but were outweighed by the fact that substantial benefits had been received through a structure resulting in a weak employer covenant.

Reasonableness factors in Section 43(7)

1. When deciding whether it would be reasonable to issue an FSD the Regulator must consider the list of factors in Section 43(7) of the Pensions Act 2004. That list was not exhaustive and each factor should not necessarily be given equal weight.

2. The legislation should be given a purposive interpretation, with terms in Section 43(7) such as **'relationship'**, **'involvement'**, and **'benefit'** being given a wide meaning.

3. A target which has not received a substantial benefit directly or indirectly from an employer may still be issued with an FSD if it would otherwise be reasonable for the Regulator to take that step, particularly where the connection between the potential target and the employer or the scheme has broken.

4. If the potential target has received substantial benefits from the employer in circumstances where there is or has been a close relationship between the potential target and the scheme or its employer, however, it is more likely that it would be reasonable to issue the FSD.

Trustees taking account of the existence of the PPF

1. The court in *Independent Trustee Services v Hope* was not seeking to lay down a general principle about when it would be legitimate for a trustee to take into account the availability of the PPF. The point needs to be considered on a case-by-case basis.

   **Comment:** The High Court in *Hope* decided that 'gaming' the PPF by using a disproportionate share of scheme assets to buy-out benefits for some members immediately prior to the scheme entering the PPF, on the basis that the PPF would provide compensation for the remaining members, was not permissible. To read more about *Hope* please see Pensions Bulletin 09/20.

2. It was permissible for the trustee to rely on the PPF as a backstop if the negotiations with the JV shareholders failed, or if there was no prospect of an FSD. The trustee was not seeking to justify by reference to the PPF a course of conduct that would otherwise have been improper.

*Granada Limited and others v The Pensions Regulator with Box Clever Trustees Ltd (as an interested party) - released 18th May, 2018*

# Points in practice

### III. Pensions Regulator Corporate Plan 2018-2021 - greater resource and more vocal

1. Trustees and employers may wish to note that the Pensions Regulator's latest Corporate Plan announces its intention to increase its resources, and to continue with its heightened scrutiny of employers paying dividends where the scheme is underfunded.

2. The Regulator plans to implement a 12% increase in headcount over the coming year. The accompanying press release quotes the Regulator's Chairman, Mark Boyle, as stating "In the coming year, you can expect to see us being more vocal about our expectations …".

3. The Corporate Plan 2018-2021 repeats the message set out in the Regulator's 2018 Annual Funding Statement on dividends paid in circumstances where there is a pension fund deficit: "*If we see a situation where we believe a scheme is not being treated fairly relative to other creditors, we are likely to intervene and if necessary use our formal powers.*"

4. For more on the 2018 Annual Funding Statement, please see Pensions Bulletin 18/06.

### IV. Pensions Regulator and Pensions Ombudsman to share information

1. Those involved in the running of pension schemes should note that information arising from their involvement with either the Pensions Regulator or the Pensions Ombudsman may be shared between those bodies.

2. The Pensions Regulator and Pensions Ombudsman have announced (on 21st May, 2018) that they are sharing information with each other in line with an agreement that came into effect in March, 2018.

3. Under the agreement:

   - information concerning pension complaints handled by the Ombudsman may be shared with the Regulator; and

   - following a pension scheme investigation the Regulator may inform the Ombudsman of any concerns which it has regarding the scheme's failure to implement policy and procedural changes recommended by the Regulator.

4. The agreement notes that the Pensions Act 2004 limits the circumstances in which 'restricted information' (Section 82) and 'tax information' (Section 88) may be disclosed by the Regulator.

# Watch List

The Watch List is a summary of some potentially important issues for pension schemes which we have identified and where time is running out (or has recently run out), with links to more detailed information. New or changed items are in **bold**.

| No. | Topic | Deadline | Further information/action |
|---|---|---|---|
| 1. | Put in place register of persons with significant control ("PSC") for trustee company where trustee is a corporate | 6th April, 2016 and ongoing requirement | Pensions Bulletin 16/03 |
| 2. | Ban on member-borne commissions in DC schemes used for auto-enrolment | 5th July, 2016 at the latest and ongoing requirement | Trustees must notify "service providers" if the scheme is being used as a "qualifying scheme" for auto-enrolment purposes and some or all of the benefits are money purchase. Pensions Bulletin 16/04. |
| 3. | Cyclical re-enrolment | Within 6 month window by reference to | For example employers with a 1st July, 2015 staging date must complete cyclical re-enrolment process between |

| No. | Topic | Deadline | Further information/action |
|---|---|---|---|
| | | third anniversary of employer's staging date | 1st April, 2018 and 30th September, 2018. Publication available to clients on request from usual pensions contact. |
| 4. | Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase pot on or after 6th April, 2015, has dropped from £10,000 to £4,000 under Finance (No.2) Act 2017 | Retroactive effect from 6th April, 2017 | Member communications should include a warning note about this, highlighting the retroactive effect. |
| 5. | GMP equalisation | | |
| 5.1 | Part 8 action brought by female staff, trustee and Lloyds Trade Union | 15th May, 2017 | We will continue to monitor developments in this litigation, which has implications for all schemes with GMPs accrued in the period 17th May, 1990 to 5th April, 1997. |
| | | Trial window | Between 1st June, 2018 and 31st October, 2018 |
| 5.2 | Government response **to** consultation on GMP equalisation published | 13th March, 2017 | Pensions Bulletin 17/7 |
| 6. | HMRC's existing practice on VAT and pension schemes to continue indefinitely | | Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover. Pensions Bulletin 17/18 |
| 7. | DC bulk transfers without member consent: introduction of easements | 6th April, 2018 | Pensions Bulletin 17/18<br>Pensions Bulletin 18/05<br>**Pensions Bulletin 18/08** |
| 8. | Bulk transfers of contracted-out rights without consent: introduction of easements | 6th April, 2018 | Pensions Bulletin 18/01<br>Pensions Bulletin 18/05 |
| 9. | Deferred debt arrangements become available | 6th April, 2018 | Pensions Bulletin 18/05 |
| 10. | Disclosure of costs, charges and investments - new requirements | Mostly in force 6th April, 2018 | Pensions Bulletin 18/05 |
| 11. | Auto-enrolment total minimum DC contributions increase to 5% (of which minimum employer contribution of 2%) | 6th April, 2018 to 5th April, 2019 | |
| 12. | Auto-enrolment total minimum DC contributions will increase to 8% (of which minimum employer contribution of 3%) | 6th April, 2019 onwards | |
| 13. | Deadline for service providers to send trustees written confirmation of compliance with ban on member-borne commission for pre-6th April, 2016 contracts where payment made on or after 1st October, 2017. Applies where scheme used as "qualifying scheme" for auto-enrolment purposes and some or all of benefits are money purchase. | 1st May, 2018 | If confirmation not received then trustees should chase.<br>Note: This may well be an empty category for many schemes. |
| 14. | Data protection: New Regulation: EU General Data Protection Regulation in force | 25th May, 2018 | Pensions Bulletin 16/05<br>Employment Bulletin 16/15<br>As data controllers, trustees will need to ensure that compliance with the EU General Data Protection Regulation is achieved by this date.<br>A compliance checklist for trustees is available to clients from their usual Slaughter and May contact. |
| 15. | Further EMIR exemption extension for pension scheme arrangements | 16th August, 2018 | Pensions Bulletin 17/01 |
| | Additional 3 year clearing extension proposed | | Pensions Bulletin 17/10 |

| No. | Topic | Deadline | Further information/action |
|---|---|---|---|
| | | | |
| 16. | IORP II transposition deadline | 12th January, 2019 | Pensions Bulletin 16/11 |
| 17. | Brexit | By 29th March, 2019, unless extended | UK leaves EU from effective date of withdrawal agreement or, failing that, 2 years after giving Article 50 notice unless:<br>(a) European Council and UK unanimously decide to extend period, or<br>(b) UK withdraws, if able to do so, its Article 50 notice before 29th March, 2019. |

If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matters, please contact Jonathan Fenn or your usual Slaughter and May adviser.