

# Trustee Knowledge Update

CMS Cameron McKenna

Welcome to the November 2013 edition of our Trustee Knowledge Update. It aims to inform trustees about changes in the law to help them to comply with the legal requirement for each trustee (or trustee director) to have knowledge and understanding of the law relating to pensions and trusts. This edition focuses on the key legal developments over the last three months that trustees may need to be aware of.

## Government (<http://www.gov.uk>)

### Reshaping workplace pensions

The Government has published a consultation paper giving more detail about its proposed defined ambition pension schemes. In particular, it is proposed that compulsory indexation of pensions in payment will cease for pensions accrued in the future. Options are also being considered which would allow schemes to convert a deferred member's defined benefits (accrued after the date of the change) into defined contribution benefits and transfer them to a nominated fund. There are also proposals to give employers greater flexibility to change their scheme pension age to reflect increased longevity.

The focus in a DC context is on providing greater security for members without a funding liability appearing on the employer's balance sheet. The consultation paper explores various options for guaranteeing a minimum level of DC benefits and consideration is being given to what legislative changes would be required to facilitate these options.

### Definition of money purchase

The Government has started consultation on the transitional provisions and consequential amendments required to implement the new definition of money purchase benefits in the Pensions Act 2011 (which provides that benefits which can be underfunded are not money purchase benefits). Consultation closes on 12 December and it is proposed that the Regulations will come into force on 6 April 2014.

The draft Regulations are complex and include provisions on winding-up, employer debt, funding, revaluation, transfers and PPF levies. Generally speaking, schemes will not need to revisit actions taken on or before 27 July 2011 (the date of the Supreme Court judgment in the *Bridge* case and the Government's announcement of a proposed change in the law). There is also protection for some pre-6 April 2014 activities. Schemes with benefits that might become money purchase benefits as a result of the new definition should seek advice.

### Workplace pensions – a consultation on charging

The consultation paper examines how to ensure workplace pension schemes provide value for money. Consultation closes on 28 November 2013. The key issues being considered are improved disclosure about charges and a cap on pension scheme charges for members of default funds in qualifying DC schemes (of 1% or 0.75%).

## Regulator ([www.pensionsregulator.gov.uk](http://www.pensionsregulator.gov.uk))

### Warning against double counting in DB schemes

The Regulator says "*it has become increasingly apparent that some trustees and employers consider that a payment*

*under a Schedule of contributions can settle a section 75 debt (or the other way around). Double counting of payments made towards these distinct obligations is not permitted by pensions legislation and presents avoidable and unnecessary risks to members of defined benefit schemes. Where we become aware of attempted double counting we will raise this with the trustees and expect it to be addressed*". Discharging an obligation that arises in relation to ongoing funding will not discharge an obligation that arises in relation to discontinuance and vice versa. The Regulator says that legislation "*provides specific ways in which the two categories of obligation interact, which reflects and preserves their different purposes*".

### Strategy for regulating DC schemes

The Regulator has said that it expects its 31 DC quality features to be present in all DC schemes. It is "asking" trustees to produce a governance statement which explains "*the extent to which their scheme has embedded the 31 DC quality features. Trustees should make the governance statement available to members and employers, for example by publishing it in the annual report and accounts or on their website*". The Regulator intends to provide an example of such a statement. Trustees will need to go through an assessment process against the quality features to produce this statement but it is not expected that they will also publish the results of this.

## Tax ([www.hmrc.gov.uk/pensionschemes/index.htm](http://www.hmrc.gov.uk/pensionschemes/index.htm))

### Pension liberation

To try and combat pension liberation, HMRC will respond to requests for confirmation of a receiving scheme's registration status without seeking its consent. However it will only provide confirmation where the receiving scheme is registered and information held by HMRC does not indicate a significant risk that it was set up, or is being used, to facilitate pension liberation. Otherwise, a response will be issued explaining that one or both of these conditions are not satisfied.

In addition, HMRC has changed the pension scheme registration process so that registration will no longer be confirmed on successful submission of an online form. HMRC will review the application and may need to ask further questions or request additional information before deciding if the scheme can be registered.

### Asset backed contribution (ABC) guidance

Trustees contemplating entering into asset backed funding arrangements should be aware that HMRC has updated its draft guidance (although it is still in draft form). The guidance explains when upfront tax relief will be available to employers using ABC arrangements and goes through various common ABC structures.

## Legislation (<http://www.legislation.gov.uk>)

### The Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013

The new Disclosure Regulations are intended to come into force on 6 April 2014 and will repeal the existing Regulations. The Regulations have been significantly reordered to make them easier to read. Other changes are mostly clarificatory and aimed at ensuring consistency between different regimes. There are quite a number of minor changes to the disclosure regime but some of the key differences are as follows:

- simplification of some of the requirements relating to the basic scheme information that must be given to members;
- where a member of a non-money purchase arrangement requests a benefit statement, allowing trustees to choose the most appropriate retirement date when calculating the amount of benefit payable;
- allowing schemes to choose whether to issue the first money purchase benefit statement where no contributions have been credited or where the member is in their auto-enrolment opt-out period;
- allowing statutory money purchase illustrations to use more personalised assumptions;
- clarification of the use of electronic communications; and
- requiring schemes to tell members if they intend to adopt a life-styling strategy and explain the advantages and disadvantages of life-styling.

Trustees will need to check that the information they give to members complies with the new requirements.

## Auto-enrolment

### Auto-enrolment guidance

DWP has issued three new sets of auto-enrolment guidance which relate to certifying DB, hybrid and DC schemes.

In relation to phasing in hybrid schemes, the DC guidance says *"To help manage the costs of... employer contributions, employers offering money purchase occupational pension schemes [or the] the money purchase elements of certain hybrid occupational pension schemes... will be able to gradually phase in their contributions over a transitional period."* A later footnote says that the *"policy intention is that all hybrid schemes that do not defer automatic enrolment should be able to phase in contributions if they wish to but schemes that certify that the money purchase element meets one of the alternative quality requirements are currently excluded from this transitional provision. We propose to amend regulations before the end of this year to align the legislation with the policy intention."*

### The Occupational and Personal Pension Schemes (Automatic Enrolment) (Amendment) Regulations 2013

An occupational or personal pension scheme will not be an auto-enrolment scheme if it deducts amounts from a jobholder's pension pot, contributions, or income or capital gains arising from such contributions, in order to pay them to a third party under an agreement between the employer and a third party. A third party for these purposes means someone other than the jobholder, trustees or personal pension provider. However, schemes where there was a legally enforceable agreement in place between an employer and a third party before 10 May 2013 are exempt.

## PPF ([www.ppf.gov.uk](http://www.ppf.gov.uk))

### Consultation on 2014/15 levy documents

The PPF is consulting on the 2014/15 PPF levy. No significant changes are proposed to the way the levy is calculated. There are some minor changes though.

Trustees will no longer need to certify a contingent asset that offers no benefit just to ensure that it can be used in future years; it will instead be possible to recertify a contingent asset that was last certified in a year other than the immediately preceding year. There are also changes to the wording of the trustees' certification in relation to contingent assets. The new suggested wording is: *"The trustees, having made reasonable enquiry into the financial position of each certified guarantor, are reasonably satisfied that each certified guarantor, as at the date of the certificate, could meet its full commitment under the contingent asset as certified, having taken account of the likely impact of the immediate insolvency of all of the relevant employers."*

The deadlines for submissions are currently as follows:

Item	Key dates
Monthly D&B Failure Scores	Between 30 April 2013 - 31 March 2014
Submit scheme returns on Exchange	By 5pm, 31 March 2014
Reference period over which funding is smoothed	5-year period to 31 March 2014
Certification of contingent assets	By 5pm, 31 March 2014
Certification of deficit-reduction contributions	By 5pm, 30 April 2014
Certification of full block transfers	By 5pm, 30 June 2014
Invoicing starts	Autumn 2014

## Cases

### **Konica Minolta Business Solutions v Applegate**

Konica sought rectification of its scheme rules. The employer argued that the rules contained a manifest error conferring a wholly unintended windfall benefit on a group of deferred members who transferred in on a merger.

The judge said that in deciding whether to allow rectification, the parties' common intention had to be ascertained on an objective basis. He also noted that the court should be cautious of rectification claims when their effect might be *"to relieve solicitors who have made an error from the consequences of that error"*, and to look astutely at the evidence in such cases *"since such evidence, although honestly given, is capable of being warped by a subconscious wish to avoid liability for professional negligence"*.

The judge then turned to the law as it stood in situations where a written instrument was intended to produce result A, but had in fact produced result X. In such a case, the parties might never have addressed result X. However, where on an objective analysis it could clearly be seen that there was no common intent to achieve result X, there was no bar to rectification occurring and no requirement for an enquiry into uncommunicated subjective intentions of the parties. If the evidence showed what each party objectively intended and if they both executed the relevant amending instrument with the same intention, even if not communicated to each other, that would be sufficient.

In this case, there was evidence that the error was unintended. Indeed, the wrong wording in the rule in question had been pointed out during the course of the drafting process, although, through apparent oversight, it had not been corrected. Rectification was granted.

### **PI Consulting v The Pensions Regulator; Dalriada Trustees v Nidd Vale Trustees**

Members who satisfy certain conditions have a statutory right to request a transfer payment to a registered occupational or personal pension scheme. Where a transfer has been requested, trustees need to ensure that the receiving scheme satisfies these requirements. If it does, the trustees must generally make the transfer payment. An occupational pension scheme should be:

- "capable of having effect" to provide benefits on retirement;
- established by an employer, eligible employee or someone representing the interests of either; and
- for the purpose of providing benefits in respect of people including people in employment specified under the scheme rules.

The judge considered the application of the definition to nine arrangements suspected of pension liberation. He did not look at the motivations of the parties in setting up or operating the schemes. He only considered whether, on

the construction of the rules in each case, the statutory definition was satisfied. He concluded in all nine cases that it was, and that they were occupational pension schemes within the meaning of the legislation.

The case does not provide definitive guidance for trustees of transferring schemes on whether they should make transfers to suspected pension liberation arrangements. However, it does show that the definition of occupational pension scheme will be interpreted widely by the courts and as a result transfers may be payable even where liberation is suspected.

### **Ombudsman** ([www.pensions-ombudsman.org.uk](http://www.pensions-ombudsman.org.uk))

#### **Browne – unjustified maladministration in failure to pay death benefits within two years**

The member died in December 2005. The scheme rules provided that any death benefit was to be held on trust to pay or use for the benefit of any of the member's beneficiaries and personal representatives within two years of the date of death, and that in the event those trusts failed it would be held for the general purposes of the scheme.

The trustees said that, having sent the member's mother their standard information pack requesting the death certificate and beneficiary information, they had chased her in 2006 and then again as the two-year period drew closer. However, they had had no response. In April 2008, they finally obtained the death certificate and enough information to allow the benefit to be paid to the mother. In October 2008 the trustees paid out £19,000, being the lump sum entitlement less unauthorised payment charge and surcharge. The mother died and a claim was made by her estate to the Ombudsman.

The Ombudsman said the scheme rules put a substantial burden on the trustees to exercise their discretion within two years and this had not been met. The trustees' attempts to obtain relevant information had been half-hearted. Moreover, the making of the payment out of time illustrated that the trustees had not understood that the scheme rules did not actually allow payment after two years had expired. Had the trustees understood this, they would presumably have recognised that it was preferable to make a payment on "limited information" within two years rather than not make one at all.

The trustees' procedures did not adequately, if at all, identify claims that were close to the two-year limit and the failure to obtain the information in a timely way was maladministration. The trustees should pay the executors the amount of the unauthorised payment charge and surcharge together with interest from date of death, as well as interest on the death benefit already paid, again running from the date of death.

#### **Robbins - member would have sought and found work, were it not for incorrect early retirement quotation**

The member was a deferred member of the pension scheme. She ceased to be employed by her new employer

in November 2010, eleven months before her Normal Retirement Date (NRD) of October 2011. In February 2011, she sought a quote to take early retirement from deferment in March 2011 (seven months before NRD). The figures quoted an annual pension of £17,400 if she retired in March, or £17,500 if she waited until October. She opted for early retirement. In December 2011, the member was notified that she had been over-quoted and that her correct early pension entitlement was in fact £16,600. The member said that had she known this was the true figure she would not have taken her benefits early, but would have sought new employment. Instead, in reliance on the higher figure quoted to her, she had ceased looking for work.

The Deputy Pensions Ombudsman (DPO) said that the member clearly took a *“very prudent/conservative approach to her financial affairs”*. She also said that, having once been a trustee of the scheme, the member would have had *“a better understanding of the long term significance of an additional £800 a year of starting pension”*. The DPO agreed that, had the member received the correct quotation, she would not have taken her pension early and would have continued to look for employment.

The DPO went on to say that before stopping looking for work, the member had succeeded in getting a number of interviews, and would have had a reasonable prospect of securing a role before her NRD. Her potential lost earnings should be assessed based on seven months of the average salary offered by the jobs that the member had been interviewed for: this figure (£10,465) was the amount that she had been deprived of the opportunity to earn. In the event, however, *“given that Mrs Robbins potential earnings during this period had she secured a role and the amount of pension she received prior to October 2011 would broadly*

*offset each other”* she would not make any direction in relation to this. Instead, the scheme was ordered to pay the member the pension she would have received had she retired at NRD, together with any subsequent increase on it, with effect from March 2013.

## Miscellaneous

**Data Protection:** The Institute and Faculty of Actuaries, following consultation with the Information Commissioner's Office, has published guidance on the obligations of scheme actuaries and actuarial firms under the Data Protection Act. It confirms that individual scheme actuaries and their employing actuarial firms who process the personal data of scheme members may be data controllers, and not merely data processors, under the Act. As a consequence many actuarial firms and scheme actuaries are reviewing their terms of appointment. Trustees may therefore find they are approached by advisers and actuarial service providers in the next few months to amend their terms of appointment to address this.

**Government extends the Equitable Life Payments Scheme to 2015:** Government announcement that it is extending the Equitable Life Payments Scheme to mid-2015 in order to ensure that as many policyholders as possible receive the payments due to them (the scheme had previously been due to close in April 2014). It says that the scheme is still unable to trace some policyholders and that some 400,000 policies were supplied without contact addresses. There will therefore be a national advertising campaign in addition to continuing with other tracing methods.

**Dates for diaries:** Trustee training remains one of the most important ways of ensuring that trustees have the knowledge and understanding required to perform their duties. Our 2014 trustee training courses are taking place on **4<sup>th</sup> February 2014, 10<sup>th</sup> June 2014 and 14<sup>th</sup> October 2014**. If you have any enquiries about any of these courses or would like to reserve a place, please contact **Karen Mumgaard – E:** karen.mumgaard@cms-cmck.com.

**General:** For further information on our pension services, please contact **Mark Grant – E:** mark.grant@cms-cmck.com, **T:** +44 (0)20 7367 2325 or your usual pension partner. Please also visit our website at [www.cms-cmck.com](http://www.cms-cmck.com).

Get to grips with the requirements of the Pensions Regulator with our **Field Guide for trustees**. You will need to be a subscriber to our Law-Now website (which is free) to access this guide. Register at <http://www.law-now.com/register>. You can also get help here with understanding the Pensions Act 2004 and all related regulatory publications by viewing our online **Plain English guide to the Pensions Act**. If you are interested in the Pensions Ombudsman's activities, visit our website [www.law-now.com/po-info](http://www.law-now.com/po-info).

The Pensions team is part of the CMS Cameron McKenna Human Capital group and advises employers and trustees of schemes varying in size, from a few million pounds to several billion pounds. Additionally, we act for some of the largest firms of administrators, actuaries, consultants, brokers and professional trustees. We provide a full range of services in connection with occupational pension schemes, including all aspects of employment and EU law. The team also works closely with our corporate lawyers, providing support on mergers and acquisitions, insolvency lawyers supporting us on employer covenant issues, and the financial services team which specialises in regulatory and fund management matters.

The information in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice. It is not an exhaustive review of recent developments and must not be relied upon as giving definitive advice. The Update is intended to simplify and summarise the issues which it covers. It represents the law as at 7 November 2013.

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