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Pensions Legal Update

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2 **Winding up: avoiding delays**. The Pensions Regulator has published guidance providing suggestions of good practice to help trustees and others meet the Regulator's recommended two-year time frame in relation to winding-up occupational pension schemes.

3 **Corporate trustees**. The High Court has confirmed that use of a corporate trustee provides good protection for the directors of a trustee company against personal liability.

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Winding up: avoiding delays

Summary. The Pensions Regulator (the Regulator) has published guidance providing suggestions of good practice to help trustees and others meet the Regulator's recommended two-year time frame in relation to winding-up occupational pension schemes.

Background. As the legislation does not specify a time frame for the winding-up process to be completed (*section 73, Pensions Act 1995*) (1995 Act), schemes can be in the process of winding-up for many years. The recommended two-year time frame is in line with the Regulator's expectations set out in the June 2008 statement "The regulation of schemes in wind-up and in a Pension Protection Fund assessment period".

Facts. The Regulator's guidance concentrates on common, complex areas that can delay the wind-up process and offers suggestions of good practice aimed at dealing with these areas.

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The guidance:

- Outlines key activities involved in the winding up process which should be dealt with within the two-year time frame (for example, calling in a debt from the employer or securing pensioner benefits and conducting a final actuarial valuation).
- Advocates that trustees consider applying pragmatic and proportionate approaches, where appropriate, while operating in accordance with the provisions of their trust deed and rules, their fiduciary duties and any legislative requirements.
- Recognises that there may be issues that cause unavoidable delays (for example, specific legal issues which may involve court actions) and notes that trustees have a duty to report such delays to the Regulator (*section 72A, 1995 Act*).
- Recognises that the reconciliation of contracted-out liabilities is a time-consuming task and stresses that some of the first activities trustees should undertake in the winding-up process are the surrender of the contracting-out certificate and the subsequent reconciliation process. It makes it clear that the Regulator does not have a view on whether trustees should equalise guaranteed minimum pension benefits or on how they should be equalised.
- Emphasises that a project plan is key to an efficient winding-up. A winding-up plan is a statutory requirement where a scheme winds up during a recovery plan period (*section 231A, Pensions Act 2004*). There is a chart attached to the guidance which outlines the main tasks and when they should be considered in the winding-up process.
- Emphasises the importance of good administration. As trustees have a duty to ensure members receive the correct level of benefits on a winding-up, the guidance recommends that a data cleansing exercise be undertaken when the scheme is ongoing in order to facilitate the later winding-up of the scheme.

- Emphasises early communication in the winding-up process. In addition, the guidance acknowledges the statutory communication requirements applicable to trustees (under the Occupational Pension Schemes (Disclosure of Information) Regulations 1996) and encourages trustees to actively consider whether more regular communication with members is appropriate to ensure they are kept up to date with developments.
- With regard to the Regulator's power to appoint an independent trustee where there is no trustee in place (the guidance gives examples such as where the corporate trustee company is dissolved or all the trustees have resigned), provides that the legislation is changing and in the future the Regulator will need to be satisfied that such appointment is reasonable as opposed to necessary.

Source: Winding up: avoiding delays – good practice guidelines, www.thepensionsregulator.gov.uk/pdf/WindingUpGoodPractice.pdf .

Corporate trustees

The High Court has confirmed that use of a corporate trustee provides good protection for the directors of a trustee company against personal liability.

Summary. The High Court has confirmed that use of a corporate trustee provides good protection for the directors of a trustee company against personal liability.

Facts. A trustee company held shares in a family company that later became insolvent. The claimant, a beneficiary under the trust, brought an action against both the corporate trustee and its directors for failing to diversify the portfolio of assets and take appropriate professional advice. The claimant relied on the "dog-leg" claim against the directors; that is, if the directors were in breach of duty to the corporate trustee, the corporate trustees' claim against the directors formed part of the trust property and could therefore be enforced by the claimant as a beneficiary.

Decision. The court rejected the "dog-leg" claim. Accepting the claim would circumvent the clear and established principle that no direct duty is owed by trustee directors to beneficiaries. The directors of a trustee company owe duties to the trust company itself, so a claim for breach of directors' duties does not form part of the trust property. The directors of a trust company owe duties to the trustee company that are different to those that the company owes to the beneficiaries.

Comment. This decision can be applied to directors of pension scheme companies. It means that they cannot be sued directly by scheme members, at least where they have not acted dishonestly. It confirms a benefit of incorporation as a trustee company. It would not, however, prevent a trustee company from suing former directors where they had breached the duties that they owe to the trustee company. It does not mean that trustee directors can never be personally liable for loses that they cause to a trust.

Case: Gregson v HAE Trustees Ltd & Ors [2008] EWHC 1006 (Ch).

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