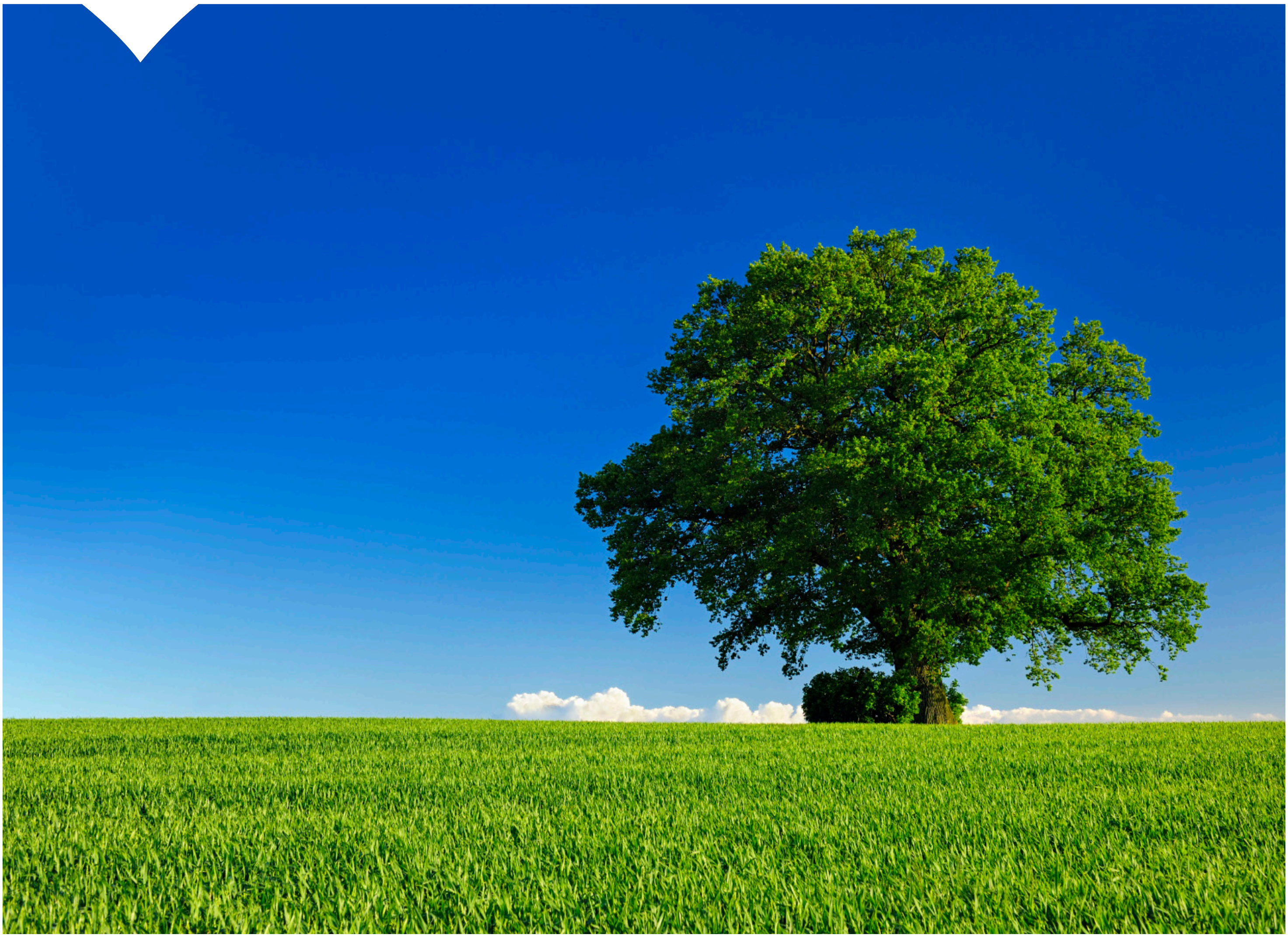
MAYER • BROWN

August 2016

Trustee Quarterly Review

Quarterly update for pension scheme trustees



Introduction

Welcome to the August 2016 edition of our Trustee Quarterly Review. The Review is published by the Mayer Brown Pensions Group each quarter, and looks at selected legal developments in the pensions industry over the previous quarter that we believe are of particular interest to trustees of occupational pension schemes. Each article summarises the relevant development and provides a short commentary on its likely implications for trustees. The Review also includes details of upcoming Pensions Group events at Mayer Brown, and a timeline of important dates and expected future developments.

Please speak to your usual contact in the Pensions Group if you have any questions on the issues covered in this edition of the Review..

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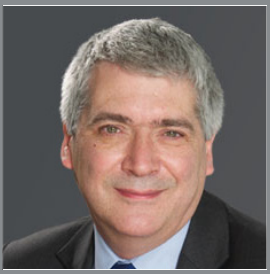

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Brexit – the impact on UK pension schemes

On 23 June, the UK voted to leave the EU. In terms of the legal impact of Brexit for UK pension schemes, the truth is that it is far too early to tell what will happen. But we can make some educated guesses.

Parliamentary sovereignty

The starting point when considering the impact of Brexit is the concept of Parliamentary sovereignty. This concept emerged out of the 17th-century constitutional crisis which encompassed the civil war, the Glorious Revolution of 1688 and the Act of Settlement of 1701. Parliament made clear – by means of beheading one king, dethroning another, and then transferring the Crown to a third over the heads of 50 people with a stronger claim – that English monarchs are bound by the law, and that the law is made by Parliament. Parliamentary sovereignty has three strands – that Parliament can make laws concerning anything; that no Parliament can bind its successors; and that a valid Act of Parliament cannot be questioned by the Courts.

European Communities Act 1972

How, then, does parliamentary sovereignty interact with EU law? The answer is that EU law only has force in the UK because of the Act of Parliament which was passed when the UK joined the (then) European Economic Community – the European Communities Act 1972 (the **"1972 Act"**). This Act gives priority to EU law, where EU law conflicts with other domestic legislation. This was made clear by the House of Lords in 1990 in the case of *Factortame* – the House of Lords declared that European law, which allowed a UK company owned and controlled by Spanish nationals to fish in UK waters and catch part of the UK's fishing quota, overrode provisions in the Merchant Shipping Act 1988 which had expressly been intended to stop this.

The flip side is that if Parliament repeals the 1972 Act, EU law will have no force in the UK (whatever the view of the European Commission or the Court of Justice of the European Union (the **"CJEU"**) (formerly called the European Court of Justice) on the matter). This was made clear by Lord Denning in the 1980 Court of Appeal case of *Macarthys v Smith* (a case on sex discrimination), when he said:

> "*If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty* [of Rome] *or any provision in it – or intentionally of acting inconsistently with it – and says so in express terms – then* [...] *it would be the duty of our Courts to follow the statute of our Parliament.*"

The House of Lords has expressed similar views. In the 2002 case of *Thoburn v Sunderland City Council* (the "metric martyrs" case, where Sunderland City Council prosecuted traders for selling fruit and vegetables by imperial, rather than metric, weights), Lord Justice Laws said:

> "*There is nothing in the European Communities Act which allows the European Court, or any other institution of the EU, to touch or qualify the conditions of Parliamentary legislative supremacy in the United Kingdom. That being so, the legislative and judicial institutions of the EU cannot intrude on these conditions.*"

What about pensions?

And so to pensions. There are four types of EU law which affect UK occupational pension schemes.

- Firstly, **treaty articles**. These are the articles of the various intergovernmental treaties which establish the EU (now consolidated in the treaty on the Functioning of the European Union (the **"TFEU"**)), which the CJEU has ruled are "directly effective" – that is, they can give directly enforceable rights to individuals within the EU. In a pensions context, the most important of these is Article 119 of the Treaty of Rome (now Article 157 of the TFEU), which provides for equal pay for equal work.
- Secondly, **regulations**. These are a form of legislation passed by the European Parliament and the Council of Ministers, which are "directly effective" – that is, they too confer directly enforceable rights on individuals. In the pensions context, the most important of these is the European Markets Infrastructure Regulation (**"EMIR"**). Amongst other things, this regulates OTC derivatives, central counterparties and trade repositories. There is also a new data protection regulation due to come into force in 2018, but if we are no longer in the EU by then it may not affect us.

- Thirdly, **directives**. These are another form of legislation passed by the European Parliament and the Council of Ministers. They are not "directly effective" – an individual cannot enforce a provision in a directive. Instead, member states have to "implement" them, by passing domestic implementing legislation. Individuals may be able to claim damages against a member state which has failed to implement a directive, but the directive alone does not change the rights of one private person against another. So, for example, provisions affecting pensions in the IORP Directive are implemented in the UK by sections of the Pensions Act 2004 (the **"2004 Act"**). The majority of EU law which affects UK pensions is in the form of directives, including:
  - the IORP Directive, the Insurance Mediation Directive, the Solvency II Directive and the Insolvency Directive (implemented through the 2004 Act);
  - the Acquired Rights Directive (implemented through the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**"TUPE"**), made under the 1972 Act);
  - the Framework Directive (on equal treatment) (implemented through the 2004 Act and the Equality Act 2010);
  - the Part Time Workers Directive (implemented by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, made under the Employment Relations Act 1999); and
  - the Fixed Term Workers Directive (implemented by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, made under the Employment Act 2002).
- Lastly, **decisions of the CJEU**. The CJEU does not decide cases as such. Instead, it answers questions as to what EU treaty articles, regulations and directives mean, which are asked of it by national courts. The national court will then apply the answer given when giving judgment in the case before it. Pensions cases which have had questions referred to the CJEU include *Barber* (whether pensions are "pay" within the meaning of Article 119 and so bound by the principle of equal pay for equal work) and the equalisation cases following it; *Beckmann* and *Martin* (transfer of pension rights on a TUPE transfer); *Wheels*, *PPG* and *ATP* (recovery of VAT on pension scheme services); *Robins* and *Hogan* (pension protection on employer insolvency); *Preston v Wolverhampton Healthcare NHS Trust* (time limits for age discrimination claims); *Birds Eye Walls* (bridging pensions); and *Test Achats* (actuarial factors).

Au revoir Europe

So how will these different types of law be affected by Brexit?

- **Treaty articles** will presumably cease to have effect once Parliament repeals the 1972 Act, unless there are saving provisions in the repealing legislation. For obvious reasons, we are not going to see a rolling back of the principle of equal pay for equal work. But the fact that this principle will in future be governed by domestic legislation will mean that thorny issues like GMP equalisation could be easier to deal with, because Parliament may be able to take a view on an appropriate way forward without worrying about whether this will infringe anyone's Treaty rights.
- **Regulations** will, like treaty articles, presumably cease to have effect once Parliament repeals the 1972 Act. However, again, whether this makes any difference in practice will depend on what alternative arrangements are put in place. It may be that Parliament decides to replicate the provisions in EMIR – possibly as part of arrangements to continue to access the single market.
- **Directives** will no longer be enforceable in the UK, but the UK legislation which implements them will remain in force unless it is amended. (The exception to this is TUPE, which is made directly under the 1972 Act. If this Act is repealed, TUPE would be too, unless it is re-enacted. Given how fundamental TUPE is to UK business, it seems likely that it would be preserved.) There will, however, be scope to amend the implementing legislation to make it better tailored to UK pensions. For example, it would be possible to repeal s255 of the 2004 Act (which implements part of the IORP Directive and effectively stops pension schemes providing life assurance to non-members). Depending on

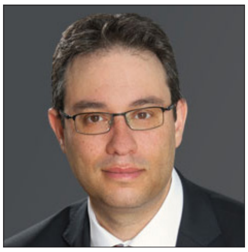
arrangements reached with other EU member states, it may also be possible to repeal the provisions of the 2004 Act which require cross-border schemes with members in other European Economic Area states to be fully funded.

- Future **judgments of the CJEU** will no longer bind UK courts. However, existing UK court judgments which rely for their decision on EU law or on decisions of the CJEU will not become invalid. It is an open question as to whether, in the future, a court in the UK will look at CJEU decisions when deciding what UK legislation originally based on EU legislation means, or will take into account relevant CJEU cases (in the same way in which it would take into account relevant cases in common law jurisdictions) when coming to its decision.

Comment

Ultimately, the extent to which EU law continues to affect UK pension schemes will depend on the terms of withdrawal from the EU that the UK negotiates. As far as domestic UK law is concerned, if Parliament repeals the 1972 Act, EU law has no force within the UK. However, politically, the UK will be constrained by the extent to which it wishes to preserve good relations with other EU member states, and access to the EU single market – this may require the UK to agree to continue to observe EU law to a greater or lesser extent. If there is one thing that is certain, it is that Brexit will provide plenty of opportunities for pensions in the coming years.

The Pensions Regulator has published a statement on market volatility following the Brexit vote. This emphasises that is too early to understand or assess the full consequences of the Brexit vote in detail, and recommends that trustees and sponsors of occupational schemes remain vigilant and review their circumstances, but continue to take a considered approach to action, focusing on the longer term.



Andrew Block

DB funding – the Pensions Regulator's 2016 statement

The Pensions Regulator (the **"Regulator"**) has published its 2016 annual funding statement for DB pension schemes (the **"funding statement"**). The funding statement is aimed primarily at those schemes which have valuations with effective dates in the period from 22 September 2015 to 21 September 2016.

The funding statement

Published in May, before the Brexit vote, the funding statement addresses a number of issues to be considered by employers and trustees of schemes carrying out valuations, both generally and in 2016. As mentioned in the previous article, since the Brexit vote, the Regulator has published a guidance statement for trustees on market volatility following the vote (the **"Brexit statement"**).

General considerations

The funding statement reminds schemes that integrated risk management (**"IRM"**) is a central feature of the DB funding code of practice. Trustees are directed to take a proportionate approach to understanding their scheme's exposure to risk across employer covenant, investment, and funding. Trustees should put in place a funding and risk management strategy that is integrated across those three areas, and appropriately document their decisions.

It is noted that liquidity planning is becoming an important consideration for maturing schemes. Trustees should understand when liquidity could become an issue, and have appropriate cash flow management plans in place.

2016 valuation considerations

In a theme repeated in the Brexit statement, trustees should not be overly focused on short term market movements, instead considering with advisers the extent to which market volatility affects their longer term view of expected risk and returns. The impact on funding plans and risk appetite should be considered.

The Regulator expects that most schemes will set funding strategies based on lower expected investment returns from most asset classes than at their last valuation. Trustees are warned that they should now reconsider any assumptions they may have had regarding a possible gilt yield reversion in light of market expectation of lower gilt yields over the longer term.

The Regulator expects that most schemes will have a larger than expected deficit at their valuation date and will need to make changes to their existing recovery plan. The Regulator's analysis indicates that, for the majority of schemes, the employer will be able to afford to increase contributions, with the possibility that their existing recovery plan end date can be maintained. The Regulator expects trustees to seek higher contributions where this will not have a material impact on the employer's sustainable growth plans. Where employers say that increased contributions are not affordable, the Regulator stresses that trustees and employers should discuss openly why current contributions cannot be increased before they conclude that other adjustments are necessary.

As part of their IRM approach, trustees should decide how much and when to hedge against risks, ensuring they are aware of the degree of risk which remains un-hedged.

The funding statement directs that, where trustees are considering adjusting their assumptions regarding the take-up of transfers from their scheme in light of the "pension freedoms", assumptions should be evidence-based. There is likely to be very little evidence at this time to support adjustments. Similarly, the 2015 version of the Continuous Mortality Investigation model (**"CMI2015"**) produces lower life expectancies than the 2014 version. Whilst it is reasonable to update to CMI2015 data, trustees should be cautious of assuming that decreased life expectancy will be a long-term trend.

Regarding the late submission of scheme valuations, the Regulator is more likely to take enforcement action where delays could have been predicted, or where trustees have not engaged with the Regulator regarding a potential or an actual breach.

The Regulator has already contacted all of the schemes carrying out 2016 valuations that have been selected for proactive engagement.

Comment

For pension schemes with effective dates during the relevant period, recent market volatility may be a significant issue. In its Brexit statement, the Regulator chose to reiterate the key messages from the funding statement i.e. that trustees should continue to take a considered approach to action, with a focus on the longer term.

The Regulator also rightly focuses on the impact of the Brexit vote on employer covenant. The funding statement warns that where deficit contributions are constrained to allow for investment in the sustainable growth of the sponsor, cash should continue to be used to strengthen the covenant rather than being diverted away from the covenant. The Brexit statement goes on to recommend that trustees have an open and collaborative discussion with the employer to understand the possible effects of Brexit on the employer's business, the employer's views and position, along with the impact of this for their risk appetite in respect of the scheme.

Liam Kellett

Cap on early exit charges in occupational DC pension schemes – DWP consultation

The DWP has published a consultation on the introduction of a cap on early exit charges when a member leaves an occupational DC pension scheme to take advantage of the pensions freedoms now available.

Overview

The DWP's consultation follows the Financial Conduct Authority's consultation on imposing an early exit charge cap in personal pension schemes. The DWP wants to ensure "*a fair and consistent approach across all defined contribution pensions*". The consultation runs until 16 August 2016. The intention is that the cap will be introduced next year.

The DWP believes that significant early exit charges deter members of occupational DC schemes from accessing the pension freedoms (i.e. choosing to access their pension pot in any way other than by using at least 75% to buy an annuity and taking the rest as an immediate tax-free lump sum). Early exit charges are not to be banned, but rather a cap is to be introduced to minimise the barriers to members using their pension pots as they want. The DWP sets out various proposals about the cap in its consultation, which are summarised briefly below.

DWP proposals

- Whoever applies an early exit charge on members of an occupational DC scheme in practice will be responsible for ensuring that the charge complies with the cap, and the Pensions Regulator will monitor compliance.
- The DWP wants guidance from the industry on what charges exist so it can ensure that early exit charges are defined clearly and consistently. The current intention is that an early exit charge will include any charge imposed on a member simply because that member wants to access the pensions freedoms, but will not include any adjustments that apply to **all members** on exit which are only intended to reflect the difference between a member's indicative value of benefits and the market value of their benefits at the point of exit (including discretionary terminal bonuses).
- The cap will not be a flat monetary cap. Rather, it is proposed that it will be 1% of a member's accrued rights for existing contracts, and 0% for new contracts (on the basis that for new contracts a reasonable administration cost can be charged to cover the costs of early exit).

Comment

It remains to be seen how the industry will respond to the proposed details of the DWP's early exit charge cap in occupational DC schemes, or what legislation will emerge over the next year. But we expect that, in principle, this change will be welcomed by members who will find it easier and cheaper to access the pensions freedoms that are now available to them.

Beth Brown

Bulk transfers without member consent – factors to be considered by the scheme actuary

In the context of bulk transfers without consent, the High Court has considered whether the scheme actuary can take the security of benefits into account when certifying whether benefits under a receiving scheme will be "*broadly, no less favourable than the rights to be transferred*".

Background

The case concerned a proposed bulk transfer of the assets and liabilities of the Halcrow Pension Scheme (**"HPS"**) to a new occupational pension scheme known as HPS2.

HPS was in severe deficit and its sponsoring employer, Halcrow Group Limited (**"HGL"**) could only continue as a going concern with substantial financial support from its US parent. However, the parent company intended to cease providing the support that HGL needed in order to contribute to HPS at an acceptable level. This would have led to HGL being placed into administration, HPS going into the Pension Protection Fund (the **"PPF"**), and members' benefits being reduced to PPF compensation levels.

The proposal was broadly as follows: the assets and liabilities of HPS would be transferred (without member consent) to HPS2, which would be backed by a financial guarantee from HGL's parent. The benefits under HPS2 would be at least equal to, and in many cases better than, the PPF compensation that members would receive if HGL went into administration. Although pension increases under HPS2 would be less generous than under HPS, it was common ground that the security of members' benefits would be higher in HPS2. The trustees of HPS had taken professional advice, and were satisfied that the proposed transfer was in the best interests of its members.

The preservation legislation required the trustees to obtain an actuary's certificate confirming that, in the actuary's opinion, the rights to be acquired by each member under HPS2 were "*broadly no less favourable*" than their rights under HPS.

The preservation legislation

The first issue addressed by the Court was whether the actuary was entitled to consider the ability of each scheme to pay the members' benefits (i.e. the security of members' benefits) when determining whether the rights acquired by members under HPS2 would be "*broadly no less favourable*" than their rights under HPS.

The judge held that the meaning of the legislation was clear – the security of members' benefits could not be taken into account. She considered that if the security of members' benefits was a relevant factor for the actuary to consider, the legislation would have expressly said so. The phrase *"broadly no less favourable"* required a comparison between the headline value of benefits in each scheme, but it did not give the actuary a broad discretion to take into account whatever matters he or she thought fit.

Further, as the certificate did not authorise or recommend the bulk transfer, there was no need for the actuary to consider security of benefits. That was a matter for the trustees to take into account in exercising their fiduciary duties. The judge noted that trustees were better placed to take advice on the security of members' benefits under the two schemes.

The Court went on to consider whether the answer would be different if HPS was in winding-up. If HPS was wound-up, members would not necessarily be paid their benefits in full. It was argued that the reduced amount that members would in fact be paid should be used for the purpose of the comparison required by the *"broadly no less favourable"* test, rather than the headline level of benefits. The judge disagreed, concluding that there was no scope for the legislation to operate differently when the transferring scheme is in winding-up (with the anomalies that such an approach would create). It was necessary to compare members' benefit entitlements in both schemes, even where as a practical matter members were unlikely to receive their full entitlements under the transferring scheme.

The trustees' decision-making process

The trustees had decided to proceed with the proposal, subject to obtaining the Court's guidance on the above legal issues. It followed from the judge's conclusions on the "*broadly no less favourable*" test that the actuary could not provide the required certificate, and the bulk transfer could not proceed.

The judge nonetheless briefly dealt with the trustees' decision-making process and the test that should be applied when trustees ask for the Court's blessing before going ahead with a momentous decision. The Court's role is to ask whether the trustees have taken into account irrelevant, improper or irrational factors, or reached a decision that no reasonable body of trustees properly directing themselves could have reached – it is not for the Court to substitute its own view of what it would have decided in the situation facing the trustees.

The judge noted that the HPS trustees had taken expert legal, actuarial and covenant advice, and she said that they were entitled to rely on that advice without being required to "second-guess" it in any way. She was satisfied that the trustees "undertook a careful and proper review of all the relevant issues", and that they had reached a decision which a reasonably body of trustees could properly have reached. The judge expressed "some reluctance" in concluding that the security of benefits could not be taken into account and said that, had she taken a different view on the legal issues, she would have approved the trustees' decision to go ahead.

Speed and confidentiality

It is noteworthy that the Court was willing to accommodate the need to have the legal issues resolved both quickly and on a confidential basis. The proceedings were issued in June 2015, with trial listed for as early as late August 2015, and the parties were informed of the judge's decision on the "*broadly no less favourable*" test in early October 2015.

As far as confidentiality was concerned, had HGL's financial position and the possible withdrawal of its US parent's support been made public, that might itself have caused the proposal to fail. The usual rule is that hearings should be held in public, but the Court was prepared to order a private hearing and that access to the Court file be restricted. It also directed that the judgment should remain private, but only on a temporary basis, striking a balance between preserving confidentiality to enable the parties to find an alternative solution to the financial difficulties facing HGL and HPS, and the public interest in the Court's ruling on this important issue being published.

Subsequent developments

Following publication of the Court's judgment, the Regulator published a regulatory intervention report setting out the deal that was eventually agreed between the trustees, HGL, HGL's parent, the Regulator and the PPF in relation to HPS. The agreed deal involves:

- establishment of a new scheme offering benefits that are lower than under HPS, but higher than PPF compensation – members will be given the option to transfer to this scheme which will be supported by HGL and will have a limited guarantee from HGL's parent;
- members who choose not to transfer remaining in HPS which will enter the PPF; and
- entry into a regulated apportionment arrangement in relation to HPS (to separate it from HGL) – HGL's parent will make a payment into HPS and provide an equity stake in HGL.

Comment

This case is another example of the difficulties that many trustees and employers are encountering in trying to manage DB liabilities in a way that protects members whilst avoiding the employer's insolvency. It remains to be seen whether the solution agreed in this case is attempted by other schemes.

The DWP also recently consulted on a proposal to let trustees of very large schemes make bulk transfers without member consent where the purpose of the transfer is to enable a restructuring of DB liabilities. Under the proposal, members who did not want to transfer could still elect not to – all that would change is the fallback position for members who did not make an election. Additionally, any such transfer would be subject to a number of restrictions, including a requirement for the trustees to be satisfied that the transfer is in members' best interests and that the scheme will otherwise enter a PPF assessment period within the next 12 months, and for the only difference in the benefits provided by the transferring and receiving schemes to be the level of indexation and revaluation.

Stuart Pickford

Scheme segregation for employer debt purposes – High Court guidance

The High Court has considered whether a multi-employer scheme offering DB and DC benefits was segregated for the purposes of the employer debt legislation. In reaching its decision, the Court looked at the effect of the scheme's partial termination, winding-up and expenses rules.

Background

The case concerned whether a multi-employer scheme with both DB and DC sections was a "segregated scheme" for the purposes of the employer debt legislation. The question arose because one of the participating employers wished to move all its remaining members in the DB section to the DC section. If the DB section was legally segregated from the DC section, this would trigger an obligation on the employer to make good its share of the deficit in the DB section (an **"employer debt"**). However, if the sections were not segregated, no employer debt would arise.

Under the employer debt legislation, two conditions must be met in order for a scheme to be segregated:

- contributions made by an employer or member must be allocated to that employer's (or, if applicable, that member's) section (the **"contributions condition"**); and
- a specified proportion of the scheme's assets must be attributable to each section and must not be capable of being used for the purposes of any other section (the **"assets condition"**).

The High Court's decision

The Court concluded that that the contributions condition was met. The judge rejected an argument that the legislation required the scheme to have different sections for each employer participating in the scheme – in this case, more than one employer participated in both the DB and the DC sections.

However, the Court also had to consider the assets condition. The parties agreed that the first part of the assets condition was met i.e. that a specified proportion of the scheme's assets was attributable to each section. However, three provisions in the scheme's trust deed arguably breached the second part of the assets condition – i.e. that the assets of one section must not be capable of being used for the purposes of another section. The Court considered each of these provisions and decided that two of them did not breach the assets condition, but that the third did. In more detail:

- The trust deed provided that, in the event of partial termination of the scheme, separate DB and DC funds would be established. This could be achieved in two different ways – by allocation of particular assets to each fund or, alternatively, by an accounting exercise where the adjustments would simply be recorded for accounting purposes. If the latter method was adopted, the trust deed allowed the trustees to make additions to the DB fund by reference to investment gains on assets in the DC fund. The judge concluded that this did not breach the assets condition – all the provision meant was that, where the accounting exercise method was used, investment gains from across the scheme were to be taken into account, and these gains would not be specific to any particular section.
- The trust deed also provided that, in the event of the winding-up of the scheme, sums could be transferred from one section to the remainder of the scheme for the benefit of the remainder of the scheme. Although at first sight this appeared to breach the assets condition, the employer debt legislation provides for transfers of assets from one section to another on a winding-up of the scheme or of a section to be disregarded. The judge therefore concluded that this provision did not breach the assets condition.
- Lastly, the trust deed provided that the trustees could recover expenses incurred in relation to one section from the scheme in general, including sections other than that in respect of which the expenses were incurred. Although there was a further provision which ring-fenced DC expenses (i.e. the expenses of the DC section could not be met from the DB section), the same was not true of DB expenses. The judge therefore decided that this breached the second part of the assets condition.

It was agreed by the parties and the judge that no *de minimis* principle applied – if the contributions or assets conditions were breached in any way, the scheme was not a segregated scheme. The judge therefore concluded that the scheme was not a segregated scheme.

Comment

This decision clearly turns on the particular wording of the scheme's trust deed. However, other schemes are likely to have similar partial termination, winding-up and/or expenses provisions in their trust deeds, and the Court's decision therefore provides useful guidance on whether such schemes are segregated for the purposes of the employer debt legislation. A very similar definition is used in the scheme funding and winding-up legislation, so the Court's decision will also be helpful in determining whether schemes are segregated for scheme funding and winding-up purposes.

Richard Evans

In other news...

Queen's Speech – Pensions Bill

The Queen's Speech announced a Pensions Bill which will, among other things:

- impose a cap on early exit charges in trust-based DC schemes;
- increase the regulation of master trusts; and
- establish a new pensions guidance body.

Chair's DC governance statement – first fine for non-compliance

The Pensions Regulator has issued the first fine for non-compliance with the statutory obligation for DC schemes to produce a chair's annual governance statement. The legislation imposes a mandatory fine of up to £2,000 for non-compliance. The scheme in question notified the Regulator of its failure to produce the statement and received the minimum mandatory fine of £500.

EU Data Protection Regulation

The European Parliament has formally approved a new Data Protection Regulation which will replace the current Data Protection Directive. The key changes that the Regulation will introduce include:

- a single legal framework that will be directly applicable in all EU member states;
- enhanced rights for individuals in relation to access to, and the processing of, their personal data;
- direct compliance obligations on data processors; and
- a significant increase in maximum fines for non-compliance.

The Regulation will be effective from 25 May 2018, but the extent to which pension schemes in the UK are required to comply with its provisions will depend on the Brexit withdrawal terms that are negotiated – and whether the UK has officially left the EU when it comes into force.

IORP II Directive – text finalised

The text of the IORP II Directive has been agreed by the European Commission, the Council of Europe and the European Parliament. The Directive will apply to occupational pension schemes, and will replace the IORP Directive (largely implemented in the UK by the Pensions Act 2004).

Among other things, the Directive will impose new requirements in relation to:

- cross-border schemes;
- transfers;
- governance, including risk management, outsourcing and internal audit; and
- member benefit statements.

The Directive will now be laid before the European Parliament for formal approval. It will then be published in the Official Journal, at which point it will come into force. Member states will have two years from that date to implement it. As with the Data Protection Regulation, the extent to which the UK is required to implement the Directive's provisions will depend on the Brexit withdrawal terms that are negotiated and whether the UK has left the EU by its implementation date.

Execution of incorrect deed – rectification granted

The High Court has granted an application for summary judgment seeking rectification of a pension scheme trust deed and rules where an earlier draft, rather than the finalised draft, of the trust deed and rules was prepared and executed. The Court ordered rectification of the trust deed and rules so as to reflect the finalised draft agreed by the parties.

Principal employer substitution power – requirements for exercise

When considering a scheme rule about replacing the principal employer (a **"substitution power"**), the High Court has decided that it was not necessary to imply into the rule a requirement for that power to be exercised in writing. The substitution power was silent on how it should be exercised. The Court concluded that there was no need to imply a "degree of formality" into its exercise, given that the trust deed had set out formalities for exercising other scheme powers, making it unlikely that formal requirements for exercise of the substitution power had been omitted in error. The Court considered that the question was not whether some degree of formality would be reasonable, but whether formality was necessary to give business effect to the trust deed – and in this case it was not.

Individual claiming a deferred pension – burden of proof

The High Court has rejected an appeal against a Pensions Ombudsman determination that an individual was not entitled to a deferred pension from a DB pension scheme. Among other reasons, the Court rejected the appeal because the Ombudsman's finding that the individual was not a member of the scheme was a finding of fact, and therefore the Court could not overrule it. The Court also noted that, where there is no documentary evidence that an individual is a member of a scheme, it is for the individual to show that he or she is a member, because a scheme cannot be expected to prove that an individual of whom it has no record is not a member. The position may be different if the scheme accepts that the individual is a member, but cannot demonstrate the level of the individual's entitlement because the scheme does not have records that it should have kept.

Deciding matters of doubt – Court intervention

In a case about interpretation of the Labour Party's governing rules, the High Court made *obiter* (i.e. non-binding) comments regarding a provision in the rules that gives the Party's National Executive Committee the power to determine disputes as to the meaning, interpretation or general application of the rules. The Court accepted that there are many areas where the Committee would be better placed than a Court to determine how best to apply and interpret the rules (and that the Court should not intervene in those areas provided that an honest and reasonable approach is adopted). However, the judge also stressed that fundamental issues of interpretation of the rules were questions of law that remained within the province of the Court – the Court's power is not simply to determine whether the Committee's interpretation of the rules is honest and reasonable, but whether it is right or wrong. This case was not directly concerned with pension schemes, but the Court's comments could be relevant in the context of pension scheme rules giving trustees the power to determine matters of doubt.

Katherine Carter

Upcoming Pensions Group events at Mayer Brown

If you are interested in attending any of our events, please contact Katherine Carter (kcarter@mayerbrown.com) or your usual Mayer Brown contact. All events take place at our offices at 201 Bishopsgate, London EC2M 3AF.

- **Trustee Foundation Course**
  13 September 2016
  6 December 2016

Our Foundation Course aims to take trustees through the pensions landscape and the key legal principles relating to DB funding and investment matters, as well as some of the specific issues relating to DC schemes, in a practical and interactive way.

- **Trustee Building Blocks Classes**
  15 November 2016 – topic to be confirmed

Our Building Blocks Classes look in more detail at some of the key areas of pension scheme management.

Dates and deadlines

31 December 2016

End of transitional period during which 70%/30% split of combined investment and administration invoices can continue to be applied for VAT purposes

2017

- Government to review level and scope of DC charges cap
- Introduction of secondary annuity market
- Cap on early exit fees in DC schemes expected to come into force

5 April 2017

- Lifetime allowance deadline for members to apply for individual protection 2014
- Deadline for passing trustee resolution to amend scheme GMP revaluation rules to reflect statutory requirements applying post-abolition of contracting-out

30 September 2017

Automatic enrolment – end of transitional period for DB schemes

5 April 2018

Deadline for making resolution under s68, Pensions Act 1995 to remove protected rights provisions from scheme rules

6 April 2018

- Automatic enrolment - 2% employer contributions required for DC schemes
- CPI indexation of lifetime allowance to be introduced

21 May 2018

Deadline for implementation of Portability Directive into UK law

25 May 2018

EU Data Protection Regulation comes into force

6 April 2019

Automatic enrolment - 3% employer contributions required for DC schemes

5 April 2021

Deadline for employers to exercise statutory power to amend their schemes to reflect increase in employer NICs resulting from abolition of contracting-out

Key:

Important dates to note

For information

About Mayer Brown

Mayer Brown is a global legal services organization advising clients across the Americas, Asia, Europe and the Middle East. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, CAC 40, DAX, Hang Seng and Nikkei index companies and more than half of the world's largest banks. We provide legal services in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

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