Trustee Knowledge Update – November 2017

Welcome to the November 2017 edition of our Trustee Knowledge Update which summarises recent changes in law and regulation. It is aimed at helping trustees (including trustee directors) comply with the legal requirement 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.

Government (www.gov.uk)

Winter Finance Bill

The Government has produced proposed provisions for the Winter Finance Bill 2017 (to be confirmed in the Autumn Budget on 22 November and introduced later this year) amending the registration provisions in the Finance Act 2004 ("FA04") in relation to master trusts and occupational pension schemes with dormant employers. HMRC will be allowed to refuse registration or to deregister a scheme where:

- a sponsoring employer in relation to the scheme has been a dormant company during a continuous period of one month in the preceding year; or
- the scheme is an unauthorised Master Trust.

"Dormant" company is defined as being a company which has no significant accounting transaction during the relevant period. Schemes with sponsoring employers which are non-trading companies (or just happen not to have a relevant accounting transaction in any particular month) could be at risk of being caught by this provision.

Action points: For information only at this stage. It is hoped that the Government or HMRC will provide further clarity for schemes with supportive sponsoring employers who may technically fall within the "dormant" definition.

Data Protection Bill

The Data Protection Bill was introduced into the House of Lords on 13th September 2017. The Bill supplements the General Data Protection Regulation (GDPR) and applies a broadly equivalent regime to certain types of processing which are outside the GDPR, includes details on the functions and operation of the Information Commissioner's Office and makes provision for enforcement. The GDPR itself will be directly effective from 25 May 2018 and will later be incorporated into UK law on withdrawal from the EU.

The Bill contains some exemptions from the requirement to obtain positive consent when holding special categories of personal data (including data on health, sexual orientation and criminal convictions). There is an express exemption for occupational pension schemes but this is very limited and appears to apply only to information held about individuals who are not members or beneficiaries (for example, those named on nomination forms).

Action points: Although the Data Protection Bill itself does not take matters much further, trustees should already be preparing for the GDPR. Initial steps should include undertaking a data mapping exercise, entering new agreements with all those holding scheme data and drafting new privacy notices for members.

Regulator (www.pensionsregulator.gov.uk)

Professional Trustee Description and Monetary Penalty Policy

TPR has issued two connected policy documents. The first looks at identifying professional trustees and the second sets out its monetary penalty policy.

This is important because any professional trustee must be identified as such on the scheme return (although this is not determinative and TPR could substitute its own decision) and penalties for breaches will generally be higher for professional trustees. In addition, we understand that TPR may soon be consulting on new standards it expects of professional trustees.

The basic position is that TPR will consider a professional trustee to include any person, whether or not incorporated, who acts as a trustee of the pension scheme in the course of the business of being a trustee. TPR would not normally consider a trustee to be in the course of the business of being a trustee, even if remunerated, if:

a) they are or have been a member of the scheme or a related scheme or employed by, or a director of, a participating employer in the scheme (or an employer in the same corporate group); and

b) they do not act, or offer to act, as a trustee in relation to any unrelated scheme.

In addition, where an individual represents or promotes themselves to the trustees or sponsors of one or more unrelated schemes as having expertise in trustee matters generally (rather than just in certain areas), whether or not for remuneration, TPR would normally consider them to be acting in the course of the business of being a trustee.

Where a trustee is a professional trustee of one scheme, they will be considered to be a professional trustee of all schemes to which they are appointed.

The Monetary Penalties Policy confirms that TPR will apply three principles in determining the amount of a penalty:

- It should be proportionate to the nature of the breach and any harm caused.
- It should aim to change the behaviour of the person in breach.
- It should deter repetition of the breach by others.

There are three bands of penalties and examples are given of which breaches are likely to fall into each band. Very broadly, the level of fine for a professional trustee will be double that for non-professional trustees.

Action points: Trustees (or directors of corporate trustees) should consider whether they are professional trustees in line with TPR's description and include this information in their scheme return.

TPR response to survey on DB and DC governance and compliance

TPR has set out its plans for improving standards of governance and improving compliance with scheme funding rules in response to research conducted earlier this year among trustees and employers. In light of the survey results, TPR plans the following action:

DC schemes - launching a programme of communications to trustees, advisers and employers covering the basics of good governance. TPR will also produce a guide on preparing a chair's statement.

DB schemes – taking a tougher approach if schemes fail to submit valuations on time and will undertake "more proactive casework".

Action points: For information only.

21st Century Trusteeship – raising the standards of governance

TPR has launched a new campaign aimed at raising standards of governance (see above). It outlines how people involved in running schemes can meet expected standards and what action TPR will take if they don't improve. As part of the campaign, targeted emails will be sent to trustees, scheme managers, employers and advisers directing them to a new page on TPR's website which will set out the standards expected. The first two topics covered are general governance and roles and responsibilities.

Action points: Trustees should keep an eye out for the targeted emails and visit the TPR website periodically to keep up to date with TPR standards.

TPR/FCA guide for employers and trustees on providing support on financial matters

This guide gives information to employers and trustees on the extent of advice and support on pension issues they can give employees without being authorised by the FCA. It references existing FCA guidance for employers on promoting pensions to employees and TPR's guide on talking about DC pension schemes with employees. Very broadly, providing information on the merits of participating in an occupational pension scheme would not require authorisation. Nor would communicating factual information in relation to either occupational or workplace personal pensions as long as it is not presented in a way which also seeks to promote the scheme or encourage the individual to take particular action. The guide encourages employers and trustees to signpost Pension Wise, TPAS and MAS.

Action points: Trustees should take account of this guide when devising member communications.

PPF (www.pensionprotectionfund.org.uk)

PPF draft levy determination – contingent assets

The PPF has published its combined Policy Statement on the Third Triennium Consultation and Consultation Document for Levy Year 2018/19, together with its draft levy rules and guidance.

The Policy Statement confirms that the PPF will:

- use five new scorecards in the Experian insolvency risk model, designed to be better tailored to company size and to reflect actual experience;
- proceed with changes to standard form contingent assets (see below);
- require trustees certifying type A guarantees, whose levy saving would be £100k or more, to submit a guarantor report prepared by a covenant advisor;
- for type A guarantees, change how trustees may certify Realisable Recovery;
- for real estate asset-backed contribution arrangements, offer more flexibility on certification and valuation;
- simplify the certification of deficit reduction contributions.

The deadline for the submission of scheme data (including hard copy contingent asset documentation) will be midnight at the end of Thursday, 29 March 2018. The final levy determination is expected in December.

In a separate consultation, the PPF is proposing changes to type A (guarantee) and type B (security) contingent assets. It intends publishing new standard form documents in January 2018. Any contingent asset agreements entered into on or after the date of final publication of the new standards will need to be in the new form if they are to be accepted by the PPF for the 2018/19 levy year. Existing agreements, or those executed before the publication date, can still be submitted in the old form. We understand that the PPF intends requiring all Type A and Type B contingent assets to be re-executed in the new form for the 2019/20 levy year.

Action points: Trustees with PPF compliant contingent assets should be taking steps to start the certification process. Any new Type A or B guarantees currently under negotiation should be completed by 31 December 2017 if they are to be on the existing forms.

Tax (www.hmrc.gov.uk/pensionschemes/index.htm)

VAT – HMRC confirms current arrangements can continue

HMRC has published revised guidance for occupational pension schemes in its VAT Input Tax (VIT) manual. It confirms that current arrangements for recovery of VAT on pension costs can continue.

In a separate Brief, HMRC confirms that, with effect from 1 January 2018, pensions fund management services provided by regulated insurance companies will no longer be exempt from VAT. This should not affect services provided to most DC schemes as they will still be subject to an exemption for "Special Investment Funds". Insurers supplying pension fund management services to DB schemes will, from 1 January, be subject to the same rules as other providers.

Action points: Trustees of DB schemes may wish to review their invoicing arrangements with any regulated insurers.

Cases

Safeway v Newton (Court of Appeal)

In *Safeway v Newton*, the Court of Appeal has handed down an important judgment relating to how schemes equalised normal retirement age following the Barber decision in 1990. This judgment potentially throws into doubt the previously accepted position (at least under English law) that an announcement followed, some time later, by a formal amendment of the trust deed would only be effective to equalise retirement ages from the date of the deed unless the scheme rules expressly permitted amendment by announcement.

In *Safeway*, the scheme amendment power allowed the principal employer and trustees to amend the scheme by deed, but the amendment could take effect from "the date of any prior written announcement to Members". The case considered whether the scheme had equalised the retirement age with effect from 1 December 1991 (the date of a letter to members confirming the purported equalisation) or only from May 1996 (when a deed formally amending the rules, stated to take effect from December 1991, was executed). In early 2016 the High Court followed the approach in previous cases and held that equalisation was only effective from the date of the deed. The employer appealed to the Court of Appeal.

First, the Court confirmed that the scheme's power of amendment could only be exercised by deed, and not by written announcement.

Next, the Court had to decide whether, as a matter of EU equal treatment law (in particular the case of *Smith v Avdel*), the deed of amendment, once executed, could give effect to equalisation retrospectively to 1991. The Court said that under domestic law, female members' right to a retirement age of 60 was 'defeasible' during the period from December 1991 until May 1996. This was because for the whole of that period, there was an announcement in place, increasing their retirement age to age 65, which was capable of being implemented at any time by the execution of an amending deed.

The critical question, said the Court, was whether EU case law really did establish a principle which outlawed retrospective levelling-down during the Barber window, in circumstances where the employer and/or trustees had power to make a retrospective change under domestic law. In an outcome that will surprise many, the Court disagreed with the High Court's view that the relevant European authorities were enough to decide this point. The Court therefore referred the question to the Court of Justice of the European Union (CJEU). It is not yet clear whether the question put to the CJEU will only cover schemes, like the one in *Safeway*, where the power of amendment expressly referred to backdating to the date of an announcement, or whether it would cover any scheme which allowed retrospective amendments.

The question of whether schemes have validly equalised retirement ages can have significant cost implications. It has been a common basis for professional negligence claims, and may cause problems when seeking to determine benefits for buy-out, PPF entry or scheme valuation purposes. But, some 27 years on from the Barber judgment, it seems that we still don't know its full implications.

> **Action points:** Pending the CJEU ruling, we do not consider that schemes which have followed the reasoning in previous cases need to change the way they administer benefits. However, trustees and employers may wish to take further advice as to how they could be affected by the CJEU's ultimate conclusions.

Smith v Sheffield Teaching Hospitals (High Court)

The case is an appeal from a determination of the Deputy Pensions Ombudsman (DPO). Mrs Smith had complained that she had relied on incorrect information from her employer (provided over a number of years) when she decided to retire – resulting in a lower pension than she had expected to receive. Her employer did not dispute that the incorrect information had been given and had offered Mrs Smith £5,000 in settlement, which she had rejected.

The DPO determined that the provision of the incorrect information amounted to maladministration but that Mrs Smith had not relied on that information in making her decision to retire and that she therefore had not demonstrated any financial loss. The DPO directed the employer to pay Mrs Smith £500 for the distress caused by the incorrect information.

Mrs Smith was successful in her appeal that the distress award was too low. The judge in the High Court identifies a number of relevant factors including the fact that incorrect information had been provided on a number of different occasions over a six year period, and the length of time it had taken to come to the correct outcome once the mistake had been identified. Recent case law has suggested that the maximum distress award in "normal" circumstances should be £1,600. The judge found that in this case that the maladministration was beyond the normal parameters. A number of opportunities to correct the misinformation had been missed. He ordered the employer to pay Mrs Smith £2,750 in place of the £500 which the DPO had directed (still well under the £5,000 which the employer had originally offered).

> **Action points:** Trustees should note the level of this award when considering any settlement offer. However, it is worth emphasising that the judge accepted that the top end of the "normal" band should be £1,600. This was clearly thought to be a case outside that, although the judge may have been influenced by the significant offer originally made by the employer.

Miscellaneous

Money laundering update

In the August TKU we mentioned the new Money Laundering Regulations. Since then there has been some clarification from HMRC on the detailed records trustees must keep of their scheme's "beneficial owners" and on the requirement to report information where the scheme is liable for certain taxes. Trustees of schemes which became liable for Stamp Duty Reserve Tax or Stamp Duty Land Tax in the 2016/2017 tax year must register online with HMRC's Trust Registration Service (TRS) by 31 January 2018.

> **Action points:** Trustees should review the data they hold on members and beneficiaries to ensure they comply with the new HMRC guidance and, particularly where they have direct holdings in shares or real property, check whether they need to register with TRS.

Investment management

As a result of the redrawn Markets in Financial Instruments Directive (MiFID II) and the new Markets in Financial Investments Regulation (MiFIR), pension scheme trustees investing in traded instruments (including shares, bonds, derivatives and common investment funds) will have to obtain a legal entity identifier (LEI) by 3 January 2018.

Investment managers will not be able to continue to provide trustees with transaction services in relation to those investments if they are not able to produce an LEI.

Action points: Trustees with relevant investments should take steps to obtain an LEI (or instruct their investment manager to do so on their behalf).

DC/DC bulk transfers without consent

The DWP has published consultation on amendments to the Preservation Regulations to simplify the process for DC-DC bulk transfers without consent. The consultation closes on 30 November 2017 and the changes are due to come into effect on 6 April 2018 subject to Parliamentary approval.

The proposal is to remove both the actuarial certificate requirement and the employer relationship condition on "pure" DC-DC bulk transfers.

There will be two options:

- Transfer to an authorised master trust. This will rely solely on the trustees of the ceding scheme reviewing the receiving scheme and being satisfied that the transfer is in the best interests of the members.
- Transfer to a DC arrangement which is not an authorised master trust. Here, the trustees of the ceding scheme will have to consult an independent professional on the suitability of the receiving scheme. TPR or the DWP will be issuing guidance on this.

Action points: For information only at this stage.

Reporting transaction costs

The Financial Conduct Authority has issued a policy statement confirming that, from 3 January 2018, regulated firms which manage money on behalf of DC pension schemes will have to provide a breakdown of administration and transaction costs when requested by trustees.

Trustees are required by regulations on DC governance to assess the extent to which transaction costs borne by members represent value for money and explain this in the annual Chair's statement, alongside information about the level of transaction costs. This new FCA policy should assist trustees in complying.

Following on from that, the DWP has issued consultation on amendments to the Scheme Administration Regulations and the Disclosure Regulations imposing new requirements relating to the reporting and disclosure of charges and transaction costs for DC benefits. The consultation closes on 7 December 2017 and the changes are due to come into effect on 6 April 2018 subject to Parliamentary approval.

The new provisions will apply to those schemes which are subject to the Chair's statement requirement. The proposed changes cover two broad areas:

- Additional information to be reported in the Chair's statement;
- Publication and disclosure of charges and transaction costs.

Action points: For information only at this stage.

Ombudsman (www.pensions-ombudsman.org.uk)

For the latest on The Pensions Ombudsman and his work, please ask your regular CMS contact for a copy of our quarterly Pensions Ombudsman Update.

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. We will be holding trustee training on 21 February 2018. If you have any enquiries about this course or would like to reserve a place, please contact **Carla Kelly – E:** carla.kelly@cms-cmno.com.

If you are interested in any additional trustee or employer training, please contact **Kieron Mitchinson** (**E:** kieron.mitchinson@cms-cmno.com) who can provide you with a list of our current training topics or discuss any particular training needs you might have.

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

The Pensions team is part of the CMS Financial Markets and Pensions group and advises employers and trustees of schemes varying in size, from a few million pounds to the largest schemes in the UK. 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.