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Current issues

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Pension Schemes Bill 2019/20: where we are now?

We thought we would take advantage of the break provided by Parliament's summer recess to provide an update on progress with the current *Pension Schemes Bill*.[1] It has completed its passage through the House of Lords (where it originated), and will undergo the House of Commons' scrutiny after the holidays.

Recap

As a reminder, the Bill was originally brought forward in 2019, but was a casualty of the general election. The Government resurrected it, practically unchanged, at the start of 2020, with headline provisions that would—

- give statutory recognition to collective money purchase schemes;
- strengthen the Pensions Regulator's hand by enhancing its investigatory powers, requiring notifications and statements from those involved in certain corporate transactions, amending contribution-notice rules, and introducing new criminal offences and civil penalties for misbehaviour in connection with defined benefit (DB) schemes;
- lay the foundations for 'pensions dashboards';
- make changes to the DB funding regime, requiring each scheme to have a '*funding and investment strategy*' (FIS) describing the trustees' targeted funding level and the investments that they intend to hold by the time the target is reached, with a '*statement of strategy*' providing the Regulator with information about the FIS and its implementation, and with new powers for the Government to dictate what factors make a recovery plan '*appropriate*' to a scheme's circumstances; and
- allow for restriction of statutory transfer rights in ways intended to close down some avenues used by pensions fraudsters.

Revisions & additions

An amendment tabled in February by the Government paved the way for additional governance requirements around climate-change risk. The intention is to ensure that schemes' exposures to the effects of climate change are managed and reported on in line with the recommendations of the Taskforce on Climate-related Financial Disclosures. The Government refined the climate-change clauses in June with the introduction of requirements to consider possible future scenarios, such as the achievement of the Paris Agreement goal.

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[1] <services.parliament.uk/Bills/2019-21/pensionschemes.html>.

Other Government amendments made in June would require the Money and Pensions Service (MaPS) to establish a pensions dashboard (originally, the Bill only *permitted* it to do so, a fact which clearly made some members of the House of Lords rather nervous), and could also mean that scheme members are required in some circumstances to prove that they have obtained information or guidance (from the MaPS, for example) before they are allowed to exercise their statutory right to transfer.

The Bill had its Report Stage in the House of Lords on 30 June 2020. Their lordships were evidently in a somewhat impish mood—inspired by the holiday spirit, perhaps—and voted to make several amendments over the objections of the Government. On pensions dashboards their changes would limit (at least initially) the features that commercial providers can offer on top of basic 'check your pensions' functions, and ensure that the MaPS dashboard is allowed to operate for a year without any competition. Another amendment would oblige the Department for Work and Pensions (DWP), when making regulations about DB scheme funding, to give precedence to a list of considerations intended to ensure that (so far as is possible) schemes that are open to new members stay that way.

The Other Place

The Bill was passed by the House of Lords after its Third Reading on 15 July. It then went over to 'the Other Place'—which sounds a bit *Stranger Things*, but is really just how their lordships customarily refer to the House of Commons, and *vice versa*—where it had its First Reading (at which no-one ever reads much more than a Bill's title) on 16 July.[2] On 22 July, the House of Commons entered its summer recess, from which it is not due to return until 1 September.

There have been several significant changes along the way to this important legislation, most notably the Government's addition of climate-change-related clauses. It was also mildly amusing to see the House of Lords prepared to oblige the DWP to perform the sort of plate-spinning act in connection with open DB schemes that has (in)famously been foisted upon the Pensions Regulator via its statutory objectives. Of course, the Government enjoys a majority in the House of Commons, and can (unless there is a revolt) undo the Lords' changes.

[2] One can read the latest version of the Bill, as it was brought across from the House of Lords, here: <publications.parliament.uk/pa/bills/cbill/58-01/0165/200165.pdf>.

Finance Bill 2020/21 collective money purchase scheme provisions

The Treasury and Her Majesty's Revenue and Customs (HMRC) have published draft legislation that will appear in the Finance Bill 2020/21.[3] It includes amendments to the *Finance Act 2004*'s pension tax rules to accommodate collective money purchase (CMP) arrangements and benefits.[4]

The Pensions Schemes Bill lays the foundations for CMP schemes.[5] It is hoped that by pooling investments and risks, collective schemes will be able to provide benefits that exceed those that are typically obtained through standard money purchase schemes. However, the targeted benefits will be adjusted periodically so that the expected (actuarial) cost of paying them is no greater than the available assets.

Amendments are required to the *Finance Act 2004* regime to allow CMP arrangements to become registered pension schemes and to ensure that the payment of benefits does not give rise to unintended tax consequences. The legislation currently recognizes money purchase arrangements—of which cash balance arrangements are a sub-category—and defined benefit arrangements; as well as hybrid arrangements under which the eventual benefits will be money purchase, cash balance or defined benefits, depending on circumstances. The draft *Finance Bill* clauses would establish CMP arrangements as an additional sub-category of money purchase arrangement, with their own distinct characteristics. For example: they would be permitted to provide scheme pensions, but not lifetime annuities or drawdown pensions; when in payment those scheme pensions will be capable of being reduced in accordance with the CMP scheme's benefit-adjustment rules; and unlike standard money purchase arrangements (with the exception of those that have converted members' pots into scheme pensions 'in-house') CMP arrangements will be able to provide trivial commutation lump sums. The changes made by the Finance Bill 2020/21 are expected to come into force on 6 April 2021, alongside the Pension Schemes Bill's CMP provisions.

Responses to the draft legislation should be submitted by 15 September 2020.

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[3] < www.gov.uk/government/collections/finance-bill-2020-21>.
[4] <www.gov.uk/government/publications/pension-schemes-collective-money-purchase-benefits>.
[5] For more details, see our 60 Second News Summary, '*The Pension Schemes Bill (reprised)*', <www.hymans.co.uk/insights/research-and-publications/publication/the-pension-schemes-bill-reprised/>.

No contribution notices arising from Bernard Matthews administration

The Pensions Regulator has published a regulatory intervention report about the events leading to the insolvency of Bernard Matthews Limited, and the Pension Protection Fund (PPF) assuming responsibility for its pension scheme.[6]

Facts

Bernard Matthews Limited (named for its founder, who rose to fame in the 1980s UK as a purveyor of turkey-meat products—and even more so for the broad Norfolk accent that he deployed to great effect in some memorable television advertisements) was the sponsor of a defined benefit (DB) pension scheme. By 2013 the business was ailing, and was required to refinance a large part of its secured debt. In order to do so it entered into an arrangement with a private equity firm.

In return for its investment the private equity firm received various forms of consideration including payment-in-kind at a high rate of interest; a charge over assets that ranked second only to the bank's; and displaced the pension scheme from that position; and control of the parent company. The pension scheme trustees agreed to the weakening of their security.

The turnaround efforts had some success initially, but the business was soon hit by poor trading conditions, and in 2016 the PE firm began considering the options for selling or restructuring the corporate group. It rejected initial offers for the shares in the business that would have required it to bear material losses. One of the prospective buyers came back with a revised offer involving a 'pre-pack insolvency', under which a company will go into administration with the sale of its business and assets already arranged. Significantly, for the Regulator's purposes, this is a means of acquiring a company shorn of its liabilities, including those owed to any pension scheme. In this way, the private equity firm made a profit, and the pension scheme fell into the PPF.

Conclusions

The Regulator investigated conduct in the run-up to the private equity firm's involvement, during the period of its tenure of the business, and in the sale negotiations. It concluded that there was no evidence of unreasonable conduct on anyone's part and consequently no grounds for it to issue contribution notices.[7]

The terms that the private equity firm obtained were generous, and it profited from the affair, but it had been a high-risk investment, and the likelihood of insolvency seemed high without it. Negotiations had taken place at arm's length, and the trustees had taken expert advice and concluded that they should support the turnaround attempt in the hope that it would result in members receiving their benefits in full.

The outcome was far from 'bootiful', but it seems that those involved tried diligently to make the best of a bad situation.

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[6] <www.thepensionsregulator.gov.uk/en/document-library/enforcement-activity/regulatory-intervention-reports/bernard-matthews-regulatory-intervention-report>.

[7] The scheme sponsor did not appear to be '*insufficiently resourced*', so financial support directions were not on the cards.

Viral news— August 2020

Regulator predicts rise in COVID related insolvencies

A blog post on the Pensions Regulator's website discloses that the organization is expecting a rise in COVID-related insolvencies and corporate restructurings involving defined benefit (DB) scheme sponsors, beginning in the autumn and extending into 2021.[8]

The blog summarizes the actions the Regulator has taken since the pandemic began in respect of DB schemes. In particular, it reiterates themes from the Regulator's guidance for trustees where they are being asked to suspend or reduce contributions from an employer experiencing financial distress. Trustees are reminded to try and get something in return for any concessions made, obtain any necessary advice, manage conflicts and keep records of the bases for their decisions.

PPF to give trustees more time to pay

The Pension Protection Fund (PPF) has announced an electronic option for levy invoices[9], and the availability of a 90-day interest-free payment period for schemes or sponsoring employers that are struggling to pay their levies because of the pandemic[10].

Those who want to make use of the interest-free payment plan will need to complete an online form explaining how COVID-19 has negatively affected the scheme or business and that, as a result, it will struggle to pay the levy within the usual 28 days.

GMP Working Group member communications guidance

The Guaranteed Minimum Pension Equalization Working Group (GMPEWG) has published guidance for trustees on communicating with members at the early planning stage of 'GMP equalization'.[11]

The GMPEWG is a cross-industry partnership formed under the banner of the Pensions Administration Standards Association (PASA) to help trustees conduct GMP equalization exercises. The guidance sets out broad principles for communications and suggested answers to the questions that members might ask. There is also a checklist of the scheme documents that may need to be reviewed as a result of the equalization process.

A further instalment of guidance on communications during the implementation of an equalization exercise is to follow.

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[8] <https://blog.thepensionsregulator.gov.uk/2020/08/05/trustees-must-remain-ready-for-covid-19-balancing-act/>.
[9] <www.ppf.co.uk/news/introducing-electronic-levy-invoices>.
[10] <www.ppf.co.uk/news/need-help-paying-years-levy-invoice>.
[11] <www.pasa-uk.com/wp-content/uploads/2020/08/GMPEWG-Comms-Guidance-August-2020-FINAL-1.pdf>.

W&PC inquiry into pension scams

The House of Common's Work and Pensions Committee has begun an inquiry into pension scams.[12] It is the first part of a planned trilogy on the effects of the 2015 'Freedom and Choice' reforms (next year it will turn its attention to the themes of accessing pension savings and saving for later life).

The Committee is asking for responses to the following questions:

1. What is the prevalence of pension scams?
2. What are the current trends in pension scams?
3. What are the common outcomes of pension scams for perpetrators and victims?
4. How are existing enforcement tools being used?
5. What more can be done to prevent pension scammers operating?
6. What more can be done to prevent individuals becoming victims of pension scams?
7. What role should the pensions industry have in preventing scams?
8. Is Her Majesty's Revenue and Custom's position on the tax treatment of pension scam victims correct?
9. Are public bodies co-ordinating the response to pension scams?

The deadline for submissions is 9 September 2020**.**

Court judgments

In this article we give brief summaries of pensions-related rulings that have not otherwise featured in *Current Issues.*

Commissioners for Her Majesty's Revenue and Customs v Sippchoice Limited [2020] UKUT 0149 (TCC)

The Upper Tax Tribunal rejected an appeal against Her Majesty's Revenue and Customs' refusal to give tax relief on contributions made '*in specie*': that is to say, by a transfer of non-monetary assets (in this case, company shares). The Tribunal concluded that the statutory entitlement to relief on '*contributions paid*' is restricted to contributions of *money*, and that HMRC's *Pensions Tax Manual*, which indicates that HMRC will accept *in specie* transfers in some circumstances, '*carries little weight in this case*'.

Adams v Options Sipp UK LLP (formerly Carey Pensions UK LLP) [2020] EWHC 1229 (Ch)

The High Court dismissed claims brought against a self-invested personal pension (SIPP) provider by an 'execution only' customer who came to it via an unregulated introducer, and who used the SIPP as a vehicle for a high-risk, speculative investment.

The customer sought to rely on a provision in the financial services legislation that makes an agreement between a consumer and a person authorized by the Financial Conduct Authority (FCA) unenforceable if it was entered into because of an unauthorized third party acting in contravention of the rules. It would have entitled him to recover his investment and obtain compensation for his losses. He said that the SIPP had only been established because the *un*regulated introducer had engaged in the *regulated* activities of advising on and arranging investments. The judge rejected the customer's case on that basis, saying that the SIPP provider had erected a system designed to define and constrain the role of the introducer, and was entitled to assume that it was working; it did not know that the introducer was carrying out unauthorized activity. That combined with the evidence of the customer's awareness of

[12] <https://committees.parliament.uk/committee/164/work-and-pensions-committee/news/147610/work-and-pensions-committee-to-examine-impact-of-pension-freedoms-and-protecting-pension-savers/>.

the risks of the investment, his assumption of those risks via the contract, and his preparedness to go through with the transaction notwithstanding his knowledge, led the judge to conclude that it was just and equitable to enforce the agreement, and that there was '*no reason in the circumstances why he* [the customer] *should not take responsibility for his own decision.*'

The judge also rejected arguments that the SIPP provider had failed to act in accordance with the FCA's Conduct of Business (COBS) rules, saying that the correct starting point in construing the extent of the COBS obligations was the contract between the parties, and that it had not been demonstrated that the regulatory regime was intended to take precedence over those contractual terms or that they were unenforceable. From the contract it was clear that the SIPP provider was acting on an execution-only basis and was not advising the member, that the investment was high risk or speculative (or both), and that the member was responsible for his own investment decisions. The COBS rules could not be read as imposing a duty on the provider to advise on the suitability of the investment, which would have been unlawful (the provider did not have the necessary regulatory permissions). There was nothing that gave the member a right to bring a claim based on non-compliance with other FCA guidance arising from a 'thematic review' of SIPP operators.

Financial Conduct Authority v Avacade Limited and others [2020] EWHC 2175 (Ch)

The FCA came off considerably better in a subsequent action against two unauthorized providers of pensions services. The companies had contacted pension scheme members by telephone offering reports on their pension rights, together with options that they might pursue. Many of those contacted transferred '*very substantial sums*' to SIPPs and invested, often on an 'execution-only' basis, in 'alternative' assets (e.g. overseas teak plantations and property developments) that netted the introducers some very substantial commissions, and which in many cases then failed.

The High Court ruled that the unregulated introducers had engaged in regulated activities, made misleading statements, and issued financial promotions, all in breach of financial services laws. The judge said that the companies' directors were all knowingly concerned in the infringements.

The FCA is seeking court orders banning those involved from engaging in unauthorized activities in the UK, and will ask the Court to determine the sums that should be paid by way of restitution.[13]

Univar UK Limited v Smith & Others [2020] EWHC 1596 (Ch)

The High Court agreed to remove references to the Retail Prices Index (RPI) from a scheme's defined benefit (DB) increase rules, substituting references to the statutory minimum requirements for revaluation of deferred benefits and indexation of pensions in payment—for which the Government currently uses the Consumer Prices Index (CPI).

The claim for rectification of the trust deed and rules was brought by the scheme's principal employer, on the grounds that the RPI had been accidentally 'hard-wired' into the scheme during an exercise to consolidate its governing documentation. Prior to the consolidating deed, the scheme's rules had referred to the statutory requirements.

Having considered the contemporaneous documentation and oral evidence of witnesses, the judge accepted that neither the employer nor the trustees had intended to make the change that the consolidating deed had introduced. He assigned particular importance to a benefit summary and schedule of changes that were intended to assist the decision-makers, and made no mention of the RPI issue; and to the frank admissions of responsibility for the mistake by the lawyers who drafted the deed. Defences to rectification raised by a representative beneficiary were all considered and rejected.

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[13] <www.fca.org.uk/news/press-releases/high-court-orders-illegal-pension-introducers-avacade-alexandra-associates-pay-restitution>.

Safeway Limited v Newton & Another (No. 2) [2020] EWCA Civ 869

The Court of Appeal ruled that section 62 of the *Pensions Act 1995* (which introduced an equal treatment rule into UK occupational pension schemes) closed the *'Barber* window' when it came into force on 1 January 1996.[14] At that point the European law under which *Barber* was decided ceased to have effect. As it fell away, so too did the associated barrier to retrospective 'levelling down'. The upshot of this reasoning was that a scheme amendment made in May 1996, and which purported (as was permitted by the UK's domestic law at the time) to be backdated to 1 December 1991, could have effect from 1 January 1996 (the European Court of Justice having previously ruled out backdating to 1991).

HMRC v Parry [2020] UKSC 35

The UK's Supreme Court handed down its judgment in a long-running case about the inheritance tax implications of a transfer and omission to draw lifetime benefits by a terminally ill scheme member. It concluded that the omission to draw lifetime benefits diminished the scheme member's estate and increased the values of her sons' (whom she had nominated as beneficiaries, but with payment made at the scheme provider's discretion), and so generated an IHT charge. However, the transfer (from a buy-out policy to a personal pension) was not intended to confer gratuitous benefit, so it was exempted from IHT. (A minority of the judges also considered that the transfer and nomination in favour of the sons, in combination with the omission to draw benefits, did indicate an intention to confer gratuitous benefit on them, so that the transfer should have been subject to IHT.)

The decision was based on historical tax rules. Since 6 April 2011 the IHT legislation has said explicitly that an omission to exercise pension rights is *not* a transfer of value.

HMRC Pension Schemes Newsletter 123

Her Majesty's Revenue and Customs (HMRC) has published Pension Schemes Newsletter 123.[15] It contains articles:

- on several issues relating to the relief at source annual returns deadlines for 2019/20 (including outstanding interim payments and residency status reports);
- containing information on the migration of pension schemes to the Managing pension schemes service (specifically for those with multiple scheme administrator or practitioner IDs); and
- reminding administrators that the deadline for issuing annual allowance pension savings statements for the 2019/20 tax year is 6 October 2020.

[14] The 17 May 1990 decision of the European Court of Justice in *Barber v Guardian Royal Exchange Assurance Group* established that the principle of equal pay for men and women applied to UK occupational pension schemes. Later cases clarified some of the implications, such as the requirement for the rights of the disadvantaged class to be 'levelled up' to meet those of the more-favoured group for the period from 17 May 1990 until the scheme rules were formally amended to achieve equality. This period became known as the '*Barber* window'.

[15] <www.gov.uk/government/publications/pension-schemes-newsletter-123-august-2020/pension-schemes-newsletter-123-august-2020>.

And Finally…

AF is away this month. Normal service will resume shortly.

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