

Pensions Update

October 2016

BAKER & MCKENZIE

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Court of Appeal clarifies treatment of pensions on bankruptcy

The Court of Appeal has handed down its judgment in a case (*Horton v Henry*) concerning the question of whether a bankrupt's pension pot should be made available to meet his debts. This decision will be of interest to trustees, as well as individual scheme members and their creditors.

The decision turned on the wording of the relevant legislation, which said that the "income of the bankrupt" (to which an income payments order may attach) comprises "every payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled". Recognising the distinction between rights under a pension scheme and payments under a pension scheme, the Court held that there is no basis for concluding that a contractual right to a pension or lump sum under a personal pension policy (where the pension is not yet in payment) comes within the definition of the "income of the bankrupt". Pension pots that remain uncrystallised are not therefore available to meet a bankrupt's debts.

The decision resolves the legal uncertainty that had resulted from two earlier conflicting High Court decisions on this point (*Horton v Henry* and *Raithatha v Williamson*).

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PPF publishes consultation on 2017/18 levy

The Pension Protection Fund (the "PPF") has published a consultation document on changes to the PPF levy for 2017/18. The levy estimate for 2017/18 remains at £615 million and the consultation document does not include any substantial changes to the way in which the PPF levy will be calculated compared to the previous year. However, two changes are worth noting:

- where the move to new UK accounting standard FRS 102 would otherwise cause an artificial move in a company's insolvency risk rating, companies will be able to notify Experian and the impact of the one-off move will be removed; and
- the PPF has reiterated its commitment to ensuring the levy is calculated appropriately where a scheme's sponsoring employer is a shell or special purpose vehicle rather than a genuine business (although specific details are not included).

The consultation, which closes on 31 October 2016, can be viewed by clicking [here](#). It is expected that the PPF will finalise the rules and publish the levy determination in December 2016. It also intends to consult on the next levy triennium (2018 to 2021) around the end of the year.

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DWP consults on valuing pensions for the advice requirement

The Department for Work and Pensions (the "DWP") has published a consultation document on valuing pensions for the advice requirement and introducing new

consumer protections. The consultation document will be of interest to schemes which provide benefits that are defined contribution in nature, but which offer some form of guarantee in relation to the pension that will be available to the member (for example, guaranteed annuity rates). These types of benefits are referred to in the consultation document as "safeguarded-flexible benefits".

Since April 2015, members with "safeguarded-flexible benefits" have been required to take independent financial advice before transferring or converting their benefits to pure defined contribution benefits in order to access those benefits flexibly, unless the value of the member's benefits is £30,000 or less. The Government is proposing to simplify the way in which members' benefits are valued for this purpose, so that the value is equal to the actual transfer value to which the member would have a statutory right. At the same time, the Government is also proposing to introduce a new requirement for schemes to provide risk warnings to members with "safeguarded-flexible benefits" before they transfer or convert those benefits.

The consultation can be viewed by clicking [here](#). It closes on 7 November 2016.

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Regulator declares rule change void

On 4 October 2016, the Pensions Regulator (the "**Regulator**") issued a regulatory intervention report in relation to the DCT Civil Engineering Staff Pension Fund, a defined benefit occupational pension scheme with 11 members and assets of £1.1 million. The report can be viewed by clicking [here](#).

In 2010, the scheme rules were replaced by new rules which purported to change the basis on which members' benefits were calculated from defined benefit to defined contribution. Member consent for the change was not obtained and it appears the change did not reflect the trustees' intentions. Following the sponsoring employer's administration in 2014 and the appointment of a new independent trustee, the trustee asked the Regulator to exercise its power to declare the 2010 rule change void.

The Regulator's Determinations Panel issued an order on 4 May 2016 declaring the 2010 rule change void on the basis that:

- the members' subsisting rights were adversely affected by the rule change without the requirements of Section 67 of the Pensions Act 1995 having been complied with - this meant that the change was voidable at the discretion of the Determinations Panel; and
- it was in the members' interests to declare the rule change void, as this would ensure they would be eligible to receive PPF compensation.

As noted in the report, an alternative solution would have been for the trustee to apply to the High Court for rectification, but the Regulator considered this to be disproportionate given the size of the scheme.

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Next steps in leaving the European Union

In a ministerial statement made in the House of Commons on 10 October 2016, the Secretary of State David Davis confirmed that:

- the Prime Minister will invoke Article 50 of the EU Treaty by no later than the end of March next year - this will start the process of leaving the EU; and
- a Great Repeal Bill will be introduced in the next Parliamentary session, which will mean that the European Communities Act 1972 will cease to apply. It will also convert existing EU law into domestic law "wherever practical".

Most UK pension requirements which derive from EU law have, however, been incorporated into UK legislation and so are unlikely to be affected directly by the repeal of the 1972 Act.

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Committee publishes new evidence on regulation of pension schemes

The Work and Pensions Committee (the "**Committee**") has published a new tranche of evidence in its inquiry into the regulation of pension schemes. In particular, evidence from the PPF and the Regulator includes the following suggestions for reform:

- enhanced information-gathering and investigatory powers for the Regulator;
- more interventionist regulation of scheme funding, such as requiring more regular valuations for higher risk schemes, requiring schemes with strong employers to target shorter recovery plans and restricting the permitted length of recovery plans;
- giving the Regulator further powers to require the winding-up of pension schemes at the request of the trustees or the PPF;
- mandatory clearance in a targeted set of circumstances where corporate activity may pose a material risk to a scheme; and
- increasing the scope of contribution notices and financial support directions to provide for a "fine" element.

The submissions to the Committee can be viewed by clicking [here](#).

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Regulator launches blog

The Regulator has launched a new blog, which aims to showcase the news and views of senior Regulator staff in their own words. Topics covered so far include deficits in defined benefit schemes and auto-enrolment. The blog, which can be viewed by clicking [here](#), is likely to be of interest to both trustees and employers.

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Government cancels plans to create a market for secondary annuities

The Government announced on 18 October 2016 that it has decided not to take forward plans to introduce a secondary annuities market, which would have enabled those already in receipt of a pension from an annuity to sell the annuity and take advantage of the new benefit flexibilities. The Government has concluded that the desirability of allowing a competitive market to emerge could not be balanced with sufficient consumer protections. The announcement can be viewed by clicking [here](#).

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Pension Schemes Bill 2016-17 has first reading

The Pension Schemes Bill 2016-17 had its first reading in the House of Lords on 19 October 2016. The Bill provides for a new authorisation and supervision regime for master trusts to be introduced, which will require master trusts to demonstrate to the Regulator that they meet certain key criteria (relating, for example, to their financial position and systems and processes) on establishment and then continue to do so. Existing master trusts will be brought into the regime and required to meet the new criteria, and the Regulator will be provided with greater powers to take action where the key criteria are not met. Requirements will also be placed on trustees to act in certain ways in the event of wind up or closure of a master trust with a view to ensuring an "orderly exit".

In addition, the Bill will amend existing legislation to allow regulations to be made which support the Government's intention to introduce a cap on early exit charges in certain occupational pension schemes. It will also support the commitment the Government made in March 2014 to ban member-borne commission charges arising under existing arrangements in certain occupational pension schemes.

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Article published on fiduciary management

Claire Collier, a senior associate in Baker & McKenzie's Pensions team, has written an article exploring how to delegate successfully to a fiduciary manager. This article first appeared in the October 2016 edition of Pensions Age and is reproduced by agreement with the publishers. The full article can be viewed by clicking [here](#).

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High Court clarifies limitation periods in overpayment cases

The High Court has handed down its judgment in a case (*Webber v Department for Education*) which concerned the applicable limitation period in an overpayment case. This decision will be of particular interest to trustees seeking to recover overpaid pensions from scheme members.

Mr Webber, a member of the Teachers' Pension Scheme, was overpaid his pension by over £40,000 between 2002 and 2010. The Department for Education sought to recover the overpayments from Mr Webber and Mr Webber made a complaint to the Pensions Ombudsman. As part of his complaint, he claimed successfully that he had a limitation defence in respect of part of the claim against him, so that the Department of Education could recover only overpayments made in the previous 6 years. However, the High Court had to decide what the relevant cut-off date was for limitation purposes - the Department for Education would be able to recover overpayments made up to 6 years prior to that date.

The High Court decided that the cut-off date for limitation purposes was the date of receipt by the Pensions Ombudsman of the Department for Education's formal reply to the complaint brought by Mr Webber. This was the first time within the complaints procedure that the Department for Education had engaged in any unilateral act of demanding repayment and was therefore analogous to bringing a claim in the High Court (which is the cut-off date for limitation purposes specified in the legislation).

Trustees seeking to recover overpaid pensions from members need to be aware that the amount that can be recovered may be reduced by a limitation defence. As the High Court noted, the Department for Education could have sought to protect itself by the issue of a claim form in the High Court, but whether this will be practical or appropriate is likely to depend on the particular circumstances, including the scale of the overpayments.

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