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May 2019

**Welcome to the latest edition of our UK Pensions Update, in which we focus on a number of court judgments, including the recent Court of Appeal ruling in the *Burgess v Bic* case, and some further cases in which the Pensions Regulator (the Regulator) has been demonstrating its "quicker, clearer, tougher" approach.**

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## General Pensions News

### Pension schemes and investment: forthcoming changes to SIP requirements - are you ready?

As we have reported previously, the current provisions governing the preparation and disclosure of a scheme's statement of investment principles (SIP) will be amended from 1 October 2019. The objective of the changes is to strengthen the obligation of occupational pension scheme trustees to consider environmental, social and governance factors in investment decisions. From 1 October 2019 the SIP must set out:

- policies towards "*financially material considerations*", *which will include "environmental, social and governance considerations (including climate change)*" over an "*appropriate time*

*horizon*";

- policies on stewardship; and

- the extent to which, if at all, non-financial matters are taken into account in the selection, retention and realisation of investments. Non-financial matters are defined as "*the views of the members and beneficiaries including (but not limited to) their ethical views and their views in relation to social and environmental impact and present and future quality of life of the members and beneficiaries of the trust scheme*".

There are additional disclosure requirements on occupational schemes offering DC benefits in addition to AVCs. These are:

- to publish their SIP on a publicly available website and inform scheme members of its availability in their annual benefit statement;

- for DC schemes with more than 100 members state the policy in relation to stewardship of investments in the default investment strategy; and

- to produce and publish an implementation statement in the annual report on the extent to which the SIP has been followed during the scheme year and an explanation of any changes made to the SIP.

The relevant timescales are 1 October 2019 other than in respect of the implementation report which is for 1 October 2020 (which means that trustees will not need to produce an implementation report in respect of a SIP produced under the current regulations).

***If trustees have not already considered whether their scheme's SIP will require updating to take into account the forthcoming changes, trustees should do so in sufficient time to ensure compliance by the 1 October 2019 deadline.***

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**Creative funding strategies - challenges and opportunities**

The Regulator's March 2019 Annual Funding Statement recommended that trustees and employers consider contingent funding arrangements. Arron Slocombe and Tom McNaughton take a look at what some of the key issues are for trustees and employers in this article, which first appeared in the April edition of Pensions Age.

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**Regulator secures additional budget for 2019-2020 and acquires London offices**

The Regulator has secured an additional £7.6 million levy funding for 2019-2020. This is in addition to the increased spend which had previously been agreed with the DWP as part of the last spending review in 2015. The Regulator's total budget for 2019-2020 is almost £99 million - an increase of £13.3 million measured against the Regulator's full year spend in 2018-2019. Staff levels are projected to increase to 515 in 2019-2020 (up from 436 in the previous year).

The budget increase was confirmed in the Regulator's Corporate Plan for 2019-2022. The latest plan builds heavily on previous priorities, including embedding its "quicker, clearer, tougher" regulatory approach, revising the current Codes of Practice on funding and governance and moving forwards with the second phase of its 21 Century Trusteeship agenda to drive up governance standards (which will involve a focus on the make-up of trustee boards). Newer aspects include the development of a specific consolidation plan for DC schemes that are having difficulties meeting the required standards. The Regulator has also confirmed it will be undertaking further work together with the FCA and the new Money Advice and Pensions Service to help support pension scheme members with making informed decisions in relation to their pensions – including specifically in relation to DB to DC transfers.

In a separate report published this month it has been confirmed that the Regulator has acquired office space in central London to supplement its Brighton headquarters. The Tailored Review of the Pensions Regulator, which was undertaken as part of a regular periodic review required of all public bodies, acknowledged that the lack of London office space had been an issue for the Regulator in recent high profile cases and is an exception to the current trend for Government funded bodies to move outside London. The report also concluded that the Regulator should continue as a separate non departmental public body and that it should not be merged with any

other bodies such as the FCA, the Pension Ombudsman or the Pension Protection Fund.

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**Regulator fines professional corporate trustee £130,000**

The Regulator has imposed fines totalling £130,000 on Link Pension Trustees Limited for multiple failings in relation to the operation of the McDonald's Franchisee Pension Scheme, a master trust. The breaches by the professional corporate trustee included failing to obtain scheme accounts for four consecutive years, failing to provide members with statutory money purchase illustrations, failing to report breaches of the law to the Regulator and failing to have at least three trustees on the master trust board.

The scale of the financial penalties is significant and demonstrates the Regulator's desire to be seen to be tougher and more proactive in exercising its powers. As with the recent case involving the exercise of the Regulator's powers to fine trustees for failure to agree a scheme valuation (reported on in Disputes News below), the breaches in this case were at the extreme end of the spectrum, with breaches stretching back a number of years.

The Determination can be viewed here.

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## Pensions Disputes News

**Rule amendments: Court of Appeal rules on retrospective introduction of pension increases**

In the case of *Burgess and others v BIC UK Ltd*, the Court of Appeal has overturned the High Court's earlier decision that the trustees of the Bic UK Pension Scheme had validly introduced certain pension increases in 1991/1992 with retrospective effect. The Court of Appeal found that the necessary formalities for a valid introduction of the pension increases were not complied with at the relevant time, and the later introduction of potentially validating powers in 1993 (with retrospective effect to 1990) was not sufficient.

***This case highlights the importance of trustees following the correct formalities in the context of scheme amendments. Whilst the courts have, on occasion, been willing to construe rule requirements flexibly, the Court of Appeal has clearly given a message that there is a limit on what a court can permit.*** Lord Justice Henderson commented that "*the law should lean in favour of validating transactions undertaken by trustees in good faith if it properly can, but it must also recognise that formal requirements have a purpose, and if they are not complied with, the normal consequence is that the intended transaction is of no effect.*"

The result of the Court of Appeal's decision that the pension increase provisions were invalidly introduced means that the payment of the pension increases constitutes an overpayment. The Court of Appeal did not, consider as part of the appeal which method the trustees should use to recover those overpayments. For further information on the High Court judgment in this case, which did include consideration (obiter) of the possible methods of recovery, together with subsequent commentary from the Pensions Ombudsman specifically in relation to the method of equitable recoupment (where trustees are allowed to reduce future pension payments to take account of past overpayments), see our May 2018 and April 2019 Pension Updates.

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**Imposition of financial penalty by the Regulator on trustees for failure to agree triennial valuation was appropriate, rules Upper Tribunal**

The Upper Tribunal (Tax and Chancery Chamber) has ruled that three trustees of an occupational pension scheme must pay financial penalties at the upper end of Band B of the Regulator's Monetary Penalties Policy for failing to comply with their obligation to obtain triennial valuations.

The trustees requested a referral to the Upper Tribunal for a review of the Determinations Panel's decision in November 2018 to exercise its power impose financial penalties on the trustees of the Leicestershire DVK Retirement Benefits Scheme of £7,000 for each of the two trustees who had failed to obtain the 2013 and 2016 valuation and £3,500 for the third trustee who had been involved in the failure to obtain the 2016 valuation. The Upper Tribunal agreed with the level of financial penalty which the Determination Panel had issued.

The Regulator has historically been reluctant to impose penalties on trustees in the context of failing to reach agreement with the employer in respect of a triennial valuation, which can be a difficult area for trustees and require negotiation with the sponsoring employer. This case was only the second time the Determination Panel had imposed a financial penalty on trustees in this context, and the first time that the Upper Tribunal had been asked to review such a decision. The case provides further evidence of the Regulator's desire to demonstrate its willingness to use its powers. ***It is notable, though, that the facts of this case were at the extreme end of the spectrum: there was virtually no evidence as to what, if any steps the trustees had taken to try and finalise the valuations, which were still outstanding at the time of the determination. It remains to be seen whether the Regulator would take similar action in a case where the trustees' failings had been less egregious.***

The decision of the Upper Tribunal can be viewed here.

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**High Court rules no deemed segregation of multi-employer pension scheme for Section 75 and PPF purposes**

In the case of *PS Independent Trustees Ltd v China Shipping (UK) Agency Co. Ltd. and Another*, the High Court has ruled that part of a defined benefit multi-employer pension scheme cannot be formally segregated (or "sectionalised") for the purposes of relevant PPF regulations or Section 75 of the Pensions Act 1995 unless the rules of the pension scheme allow for such a segregation.

The background to this case was that the principal employer in the pension scheme, Johnson Stevens Agencies Ltd ("JSA"), had entered relevant insolvency proceedings in 2011. The trustees' view was that, under the rules of the pension scheme, this had triggered the winding-up of the entire pension scheme and the associated payment of a statutory debt under Section 75 of the Pensions Act 1995 by JSA, as well as by two other participating employers. However, the two participating employers argued that the effect of the insolvency was that the pension scheme had become legally segregated, meaning that only JSA was liable to payment of its proportionate part of the full Section 75 debt owing.

The judge ruled that the relevant PPF regulations dealing with segregation did not have the effect of segregating JSA's assets and liabilities from those of the other participating employers. He noted that the pension scheme's rules did not give the trustees an option to segregate employers' assets and liabilities in the circumstances (such an option would have triggered the segregating effect of the relevant PPF regulations). In addition, the Court noted that the relevant regulations could not convert a non-segregated pension scheme into a segregated scheme; rather the regulations had the effect of segregating the assets and liabilities of only the insolvent employer from the remaining employers' assets and liabilities in the scheme.

This case may be of interest to employers participating in a multi-employer scheme (particularly those employers that are not acting as the principal employer under their pension scheme) as it confirms that, subject to the particular wording of their rules, any principal employer insolvency is likely to trigger each participating employer's statutory debt under Section 75, and the PPF regulations in this area do not operate independently to alter that position.

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## Contact us

If you wish to discuss any of these issues further, please contact your usual Baker McKenzie lawyer.

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