CLIFFORD

CHANCE

UK PENSIONS UPDATE: JUNE 2021

1. PSA 21 – FIRST COMMENCEMENT REGULATIONS

The majority of the legislative reforms introduced by the Pension Schemes Act 2021 ("**PSA 21**") are not yet in force (including with regard to the much reported new criminal offences, which are expected to be brought into force in the Autumn). However, by regulations made on 24 May 2021[1], the following provisions of the PSA 21 were brought into force on 31 May 2021:

- **Climate Change Risk (Section 124)**: provisions enabling the government to regulate as to governance and disclosure requirements for trustees of occupational pension schemes in relation to climate change risk (see section 6 below).
- **Pension Protection Fund ("PPF") Changes (Section 126)**: provisions deeming certain 2018 regulations in relation to the treatment of transferred in service for the purpose of calculating PPF compensation (except for the purposes of applying a single compensation cap) as having always had effect.
- **The Pensions Regulator ("tPR") (Paragraph 8(a), Schedule 7)**: requirement for tPR to cover the circumstances of the new employer insolvency and employer resources tests in its Contribution Notice ("**CN**") Code of Practice.

Other provisions were also brought into force from the same date for the purpose only of making regulations, including CN powers (meaning of "*employer resources test*"), the duty to give notices and statements to tPR in respect of certain events, interviews, fixed penalty notices and escalating penalty notices and exercise of right to cash equivalent.

2. CONSULTATION ON UPDATE TO CN CODE OF PRACTICE AND DWP RESPONSE TO CN TEST DRAFT REGULATIONS

On 27 May 2021, tPR commenced its consultation on an updated draft of its Code of Practice regarding CNs (the "**Draft Code**"); the consultation closes on 8 July 2021. The Draft Code has been extended to cover the new employer insolvency and employer resources tests introduced by the PSA 2021, to explain what the tests are and the circumstances in which tPR would expect to issue a CN in relation to them. The draft Code indicates it will come into force in October 2021.

Note, it remains the case for the new tests that tPR must be of the opinion that it is reasonable to impose a CN, having regard to certain matters (see below).

[1] The Pension Schemes Act 2021 (Commencement No. 1) Regulations 2021

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Key points to note on the Draft Code include:

The "employer insolvency test": where tPR is of the opinion that, at the time of an act/failure, (i) the pension scheme was in deficit; and (ii) if a section 75 debt had fallen due immediately after the act/failure, this act/failure "would have materially reduced the amount of the debt likely to be recovered by the scheme".	The Draft Code confirms that the assets/liabilities of the scheme for this purpose will be estimated by tPR and must be estimated as per a section 75 debt calculation.
The "employer resources test": where tPR is of the opinion that an act/failure reduced the value of the resources of the employer and that reduction was material relative to the amount of the estimated section 75 debt in relation to the scheme.	The Draft Code says that the estimated section 75 debt will be the amount tPR estimates would become due from the employer to the trustees under section 75, disregarding any actual debt due at the relevant time.
List of circumstances in which tPR expects to issue a CN if the tests (i.e. the material detriment, employer insolvency or resources tests) are met.	Sponsor support is removed, substantially reduced or becomes nominal. Weakening of the scheme's creditor position. Some instances of paying a dividend or a return of capital by the sponsoring employer. Payments favouring other creditors of the employer over the scheme where no such sums are then due to those creditors.
TPR's Code-related Guidance: non-exhaustive illustrative examples of where the CN tests would be met in practice and where no or inadequate mitigation is provided.	A shell company replaces a moderately profitable previous sponsor with the proceeds of sale passing to the parent company and its shareholders. A profitable part of the employer's business is transferred to another group company, resulting in a loss of half of the covenant. A group restructure results in increased borrowings cross-guaranteed by all group companies and a scheme employer grants first-ranking security over its assets to support the borrowings where previously there had been limited security over any of that employer's assets. The restructuring provides no benefit to that employer's business. An employer pays a significant and unusual dividend to its parent company, which has a significant impact on the covenant.
TPR's Code-related Guidance: non-exhaustive illustrative examples of where the CN tests may not be met.	An employer has experienced poor trading as a result of market conditions. An employer grants first-ranking security over some of its assets to renegotiate its borrowings with the bank, but engages with the trustees and provided appropriate mitigation to the scheme in return for the reduction in covenant.

On 29 June 2021, the Department of Work and Pensions ("**DWP**") published a response to its March consultation on two sets of regulations relating to tPR's CN powers and enhanced information gathering powers; see our UK: Pensions Update – March 2021 for further background. The regulations remain largely as originally proposed. With respect to the "employer resources test", the DWP points to the fact that meeting the test is only one element that tPR will consider when exercising its CN powers. It flags in the response in particular that it also needs to be satisfied that it would be reasonable to impose a CN, albeit in practice the reasonableness test provides little certainty or clarity for employers. The response reiterates that the new tests are not retrospective and will only apply to acts/failures to act from 1 October 2021.

3. SECTION 89 REPORT - SANOFI

On 15 June 2021, tPR published its regulatory intervention report in relation to steps it took to agree suitable support for the Sanofi Pension Scheme with the employers and wider group, against the backdrop of what it viewed as a weakened direct covenant justifying the exercise of its financial support direction ("**FSD**") powers. The facts included in the report indicate that over a period of several years the direct employer covenant was weakened as a result of various group reorganisations and that guarantees (as well as other informal support arrangements) were put in place from the wider group as mitigation. TPR was of the view that such protections were insufficient to mitigate the risks to the scheme, in particular the risk that the remaining employers would not be able to repair the deficit in the scheme without additional support from the group.

The upshot of tPR's intervention was that the Sanofi Pension Scheme now benefits from a new guarantee package with additional protection up to £730m on insolvency for 20 years, a profit sharing agreement whereby dividends are matched by payments to the scheme, and an upfront lump sum of £37m to the scheme.

With so much focus on tPR's new criminal and CN powers under the PSA 21, this report is a reminder that tPR already has influential anti-avoidance powers. In practice, the strengthening of tPR's CN powers does not materially alter what already needs to be considered by employers when contemplating an act/event of the employer that may impact on their defined benefit pension scheme, being that they must consider whether there is material detriment and, if there is, the adequacy of proposed mitigation. It remains to be seen whether the strengthening of tPR's powers will change behaviour in particular with regard to negotiating and agreeing mitigation.

4. TPR'S ANNUAL FUNDING STATEMENT

On 26 May 2021, tPR published its Annual Funding Statement ("**AFS**") which, although aimed at schemes with a valuation date within certain specified dates, contains information and guidance that is useful for all defined benefit pension schemes.

Some of the points of interest include:

Employer Covenant	TPR states that short-term covenant viability has improved in the last year but that trustees should consider getting advice from a specialist covenant assessor, particularly if the covenant is complex, the outlook for any COVID-19 related recovery is unclear, Brexit implications appear significant, the covenant is deteriorating or the scheme has a high degree of reliance on the covenant, for example because it has a large deficit or a high level of investment risk.
Impact of COVID-19	TPR recognises that the impact of COVID-19 will have been employer/scheme specific and emphasises that trustees should keep the employer covenant under review and that employers should provide trustees with the necessary financial information to enable them to do so. TPR notes that deficits should be recovered with a view to the affordability and sustainable growth of the employer, but that schemes should be treated fairly and covenant leakage must be minimised where the outlook is uncertain, to protect creditors including the pension scheme.
Corporate Transactions	The AFS flags the expectation that there will be an increased level of corporate activity as recovery from COVID-19 progresses, and that trustees should be prepared and ready to act in this regard. TPR notes that trustees should be able to identify detrimental events and take a "*rigorous approach*" to assessing any corporate transactions and to negotiate mitigation (where relevant) to protect the interests of members and ensure fair treatment of the pension scheme.
Long-term Funding	TPR confirms its encouragement that trustees and employers set a long-term funding target consistent with how they expect to deliver the scheme's benefits, and then be prepared to evidence that their shorter-term investment and funding strategies are aligned with it. TPR also highlights that the PSA 2021 will make it a legal requirement for schemes to put in place a long-term strategy to deliver a long-term objective.
Progress of DB Funding Code	TPR does not intend to publish its seond consultation on the draft code (see our UK: Pensions Update – March 2020) until the DWP has consulted on regulations implementing the changes to defined benefit ("**DB**") scheme governance requirements in the PSA 2021. The AFS says that the new code is not expected to come into force until late 2022 "*at the earliest*".

5. TPR'S CORPORATE PLAN 2021-2024

Further to tPR's publication of its corporate strategy setting out five strategic priorities and how it will pursue these over the next fifteen years (see our UK: Pensions Update - March 2021), on 19 May 2021 tPR published its corporate plan setting out its direction for the next three years. This takes the form of an activity road map for 2021-2024, with a specific focus on 2021-2022. The roadmap aligns with the five strategic goals set out in the corporate strategy.

Some key points to note include:

Strategic Priority	Activity Road Map
SECURITY: TO ENSURE SAVERS' MONEY IS SECURE	2021-2022: update Codes and publish guidance in relation to new information-gathering and CN powers/continued supervision of schemes and encouraging stakeholders to take steps to combat scams. **2021-2024: EMBED PSA 21 POWERS/ENSURE MASTER TRUSTS MEET AUTHORISATION CRITERIA/TAKE STEPS TO TACKLE CYBER RISKS**
Value for money: To ensure savers get good value for their money	2021-2022: prepare for regulations[2] in October 2021 in relation to value for money assessments and consolidation of smaller defined contribution ("**DC**") schemes. 2021-2024: encourage consolidation as a means of improving savers outcomes.
Scrutiny of decision-making: To ensure decisions made on behalf of savers are in their best interests	2021-2022: undertake second consultation on the revised DB funding code/publish guidance and expectations on climate change regulations. 2021-2024: final revised DB funding code in place by December 2022.
Embracing innovation: Ensure market innovates to meet savers' needs	2021-2022: implement pension dashboards/develop legislative framework for DB consolidators. 2021-2024: develop guidance for pension dashboards/engage with industry as new DB consolidator models emerge/authorisation and supervision of Collective Defined Contribution Schemes.
Bold and effective regulation: To ensure tPR is a bold and effective regulator	2021-2022: moving services for automatic-enrolment in-house/undertake major systems upgrades to improve frontline regulatory work. 2021-2024: completing systems upgrades.

6. CLIMATE RISK GOVERNANCE AND REPORTING REQUIREMENTS

On 24 June 2021, the DWP published its response to the January consultation (see our UK: Pensions Update – March 2021) on the proposed new requirements for trustees to assess and report on the financial risks of climate change within their investment portfolios. Alongside this, the DWP has published updated drafts of the two sets of regulations[3] (which have now been laid before Parliament) and the accompanying statutory guidance.

The new requirements will be phased in and only the very largest schemes must meet all the climate change governance requirements from 1 October 2021 (or, if later, the date on which the trustees obtain audited accounts for that scheme year) – see our March 2021 briefing for details.

The response does not alter the key points set out in our March briefing, and in particular the consultation response reiterates (in the same way the original consultations do) that the proposals will not attempt to direct trustees in their investment decisions and that ultimately trustees have primacy in investment decisions.

TPR will have the power to issue compliance/improvement notices and financial penalties for failure to comply. These powers will be at the discretion of tPR, apart from where the failure was a failure to publish the Task Force on Climate-related Financial Disclosures ("**TCFD**") report, in which case a financial penalty is mandatory. The financial penalties issued must not exceed £5,000 for individual/£50,000 for companies, but must be at least £2,500 where the failure was failure to publish the report.

[2] The Occupational Pension Schemes (Administration, Investment, Charges and Governance) (Amendment) Regulations 2021.
[3] The Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021 and the Occupational Pension Schemes (Climate Change Governance and Reporting) (Miscellaneous Provisions and Amendments) Regulations 2021.

The draft regulations will impose both new governance and disclosure requirements including:

Governance Requirements	
Trustee Knowledge and Understanding	Trustees must have an appropriate degree of knowledge and understanding of the identification, assessment and management of risks and opportunities relating to occupational pension schemes arising from steps taken because of climate change.
General Governance	Trustees must take adequate steps to establish and maintain: (i) oversight of the climate-related risks and opportunities relevant to the scheme; and (ii) processes for satisfying themselves that those who undertake scheme governance activities and those who advise/assist the trustees on scheme governance activities (other than legal advisers) are taking adequate steps to identify, assess and where, relevant, manage any climate-related risks and opportunities.
Strategy	Trustees must (on an ongoing basis) identify climate-related risks and opportunities which they consider will have an effect on the scheme's investment and funding strategies and assess the impact.
Scenario Analysis	Trustees must, as far as they are able, in the first year and every three years thereafter, undertake scenario analysis which considers the potential impact on the scheme of the effects of the global average increase in temperature and the resilience of the scheme's investment and funding strategies in such scenarios.
Risk Management	Trustees must establish and maintain processes to enable them to identify and assess climate-related risks relevant to the scheme, to manage these risks and to ensure that management is integrated into the scheme's overall risk management.
Metrics	In the first scheme year that the requirements apply (and in any first scheme year of re-application), trustees must select a minimum of two emissions-based metrics as well as one additional climate-related metric to calculate in relation to the scheme's assets and must review their selection from time to time. Where metrics are dropped following review, replacement metrics must be selected.
Targets	Trustees must set targets for the scheme in the first scheme year that the regulations apply (and in any first scheme year of re-application) in relation to at least one of the metrics which they have selected to calculate and, as far as they are able, measure performance against targets in each scheme year.
Disclosure Requirements	
Prepare TCFD report	Trustees must prepare a report containing certain specified matters (e.g. statements as to how they have complied with all of the governance requirements) signed by the trustee Chair.
Publish on website	Trustees must publish their TCFD report on a website which is publicly available free of charge.
Reference in member materials	The TCFD report must be referenced from (but doesn't need to be included in) the Annual Report. Members must be told via any annual benefit statement that the report has been published and where they can locate it. Trustees must also provide this information to members via the scheme funding statement.
Inform tPR	Trustees must provide tPR with the website address where they have published their TCFD report via the annual scheme return submitted to tPR.

7. CONSULTATION ON DC CHARGES

On 24 May 2021, the DWP published a consultation on the implementation of a de minimis threshold of £100, below which the flat fee element of the combination charge used by pension providers cannot be charged to members. Currently, there are three permitted charging structures being broadly (i) an annual percentage charge of the pot value capped at 0.75%, (ii) a mixed annual percentage charge of funds under management plus a percentage charge on contributions, and (iii) a mixed annual percentage charge of funds under management plus a monthly or annual flat fee (being the aspect of the current charging structure subject to consultation). The consultation also seeks views on whether it would be appropriate (in the future) to replace these three charging structures with a single, universal charging structure, given that the nature of these existing structures makes it difficult for members to compare pension products based on price. The consultation closes on 16 July 2021. It is anticipated that the related legislation will come into force in April 2022.

The proposals

The DWP is proposing amendments to The Occupational Pension Schemes (Charges and Governance) Regulations 2015[4] to provide that:

- The flat fee charge may only be levied where the value of the member's rights under the scheme is more than £100.
- Where the flat fee charge, if levied in its entirety, would reduce the member's rights to less than £100, that charge may only be levied to the extent that it does not reduce the value of those rights to less than £100.
- If a member has multiple pots within the same provider's default arrangement which charges a flat fee charge: the assessment of whether a flat fee should be charged will be based on the combined value of those pots, rather than on the separate value of the individual pots. In this scenario, the flat fee can only be levied once per member.
- Where a member has several small pots of £100 or less with different pensions providers: the de minimis will be applied according to the value of the member's pots for each provider.
- The de minimis would apply to all members (i.e. both deferreds and actives).

8. CONSULTATION ON SIMPLER DC ANNUAL BENEFIT STATEMENTS

The DWP published a consultation on 17 May 2021 on new draft regulations[5] and statutory guidance introducing simpler annual benefit statements for DC schemes used for automatic-enrolment, having sought views on how to simplify members' statements back in December 2019. The consultation closed on 29 June 2021.

Some key points include:

- ***Who is in scope?***
  - Qualifying schemes, being both occupational and personal pension schemes which are used for automatic-enrolment and under which all the benefits which may be payable are DC only (where members are in the accumulation stage, i.e. not those who are drawing down benefits).
  - Defined benefit or hybrid schemes and public sector schemes are currently out of scope but may well be focussed on in the future.
- ***What do they have to do?***
  - DC annual benefit statements will need to be provided in a statement of no more than one double-sided sheet of A4 paper.
  - Schemes will need to have regard to statutory guidance which provides for the statement to be divided into 5 sections and which is accompanied by an illustrative template which shows how such information should be ordered and presented to ensure consistency across schemes.
  - Additional documents may also be provided where the information is useful to the member, but the simplified annual statement must be contained in a separate document and be the first substantive document provided in any pack of material.
  - Trustees continue to be able to provide the annual benefit statement in a different format if they are reasonably satisfied it is necessary to do so in order to comply with their duties under the Equality Act 2010.
- **When will the requirements come into force**?
  - Trustees would be required to adopt the simplified annual benefit statement from April 2022, but where they have already issued a statement prior to this date based on the old legislation, there will be no requirement to re-issue the statement as a consequence of the new regulations.

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[4] Such amendments to be made by The Occupational Pension Schemes (Charges and Governance) (Amendment) Regulations 2021.

[5] The Occupational and Personal Pension Schemes (Disclosure of Information) (Amendment) Regulations 2022.

9. IMPLEMENTATION REVIEW OF DC CHAIR'S STATEMENT

The DWP has confirmed that "*further work*" is required to address stakeholder concerns raised during an implementation review of the current DC Chair's statement procedure. The conclusions from the review are:

- ***Audience and role for the Chair's statement:*** it is clear that confusion and ambiguity is created by the fact that the Chair's statement is provided to "multiple audiences". The DWP and tPR should work to provide clarity in this regard.
- ***Content of the statement to be revisited:*** content will be revisited once a landing is reached on the intended audience for the Chair's statement. Consideration is to be given as to whether multiple documents are appropriate, one member-facing, and the other to serve as a record of the scheme's good governance.

Although outside its scope, the review notes that consideration should be given to the requirement for tPR to issue mandatory fines in relation to the Chair's statement and whether there should be an amendment to allow tPR to use discretion.

10. CONSULTATION ON PENSION SCAMS TRANSFER REGULATIONS

On 14 May 2021, the DWP published a consultation on new transfer regulations in connection with pension scams. The consultation closed on 10 June 2021, and the draft regulations (the "**Regulations**") are expected to come into force this Autumn, following publication of tPR and Financial Conduct Authority ("**FCA**") guidance.

In terms of key points:

- The Regulations would amend the statutory transfer legislation so that members would have to satisfy one of four conditions (in addition to the existing requirements for a statutory transfer) in order for the transfer to proceed:

Condition 1 – transfer to a public service pension scheme, authorised master trust, authorised CDC scheme, FCA regulated personal pension scheme. (Note that trustees will be required to confirm the receiving scheme is appropriately authorised/established, although it's unclear exactly how they are expected to do this).
Condition 2 – transfer to UK occupational scheme or Qualifying Registered Overseas Pension Scheme ("**QROPS**") where the member has demonstrated an 'employment link'. The evidence requirements for the employment link are fairly detailed (e.g. the member needs to demonstrate that they have been in employment with a sponsoring employer of the receiving scheme and receiving a minimum salary for the previous 3 months).
Condition 3 – transfer to a QROPS where the member has demonstrated a 'residency link'. The member needs to show they have been resident in the same financial jurisdiction as the QROPS for at least 6 months prior to the transfer request.
Condition 4 – for any other transfer, trustees must determine whether any "red flags" or "amber flags" are present. Where no flags are present, the transfer can proceed. Where red flags are present, the transfer cannot proceed. Where amber flag/s are present, the transfer can only proceed if the member provides evidence that they have taken expert scams guidance from the Money and Pensions Service.

- Trustees would be required to provide the member with information about these conditions within one month of the transfer request.
- Note that the new conditions will only apply to statutory transfers, not non-statutory transfers under scheme rules. Schemes will need to consider whether it's appropriate to adopt a similar approach when dealing with non-statutory transfer requests.
- Once the Regulations have been finalised, schemes will need to review their processes and member communications for compliance with the new requirements.

11. FCA FINALISED GUIDANCE ON ADVISING ON PENSION TRANSFERS

On 30 March 2021, the FCA confirmed its finalised DB transfer guidance for advisers, based on its draft guidance from June 2020. The FCA's view remains that it is in the best interests of most consumers to stay in their defined benefit pension scheme. The aim of the guidance is to help firms give suitable advice consitently, and sitting alongside the guidance is the FCA and tPR's joint guide for employers and trustees.

The FCA's guidance is structured so as to provide examples of good and poor practice of the many areas covered by the guidance (e.g. on conflicts of interest, maintaining knowledge and competence, website information and many others). The key changes to processes that firms are likely to need to make identified in the guidance include the way in which firms:

- collect information about their client's circumstances to give suitable advice;
- use the information they collect to assess where a DB transfer is suitable; and
- communicate their advice effectively to consumers.

In practice, it seems that the FCA's focus on DB transfer advice and its subsequent guidance has had an initially negative impact on the transfer advice market, by causing high professional indemnity insurance ("**PII**") premiums which in turn serves to reduce the availability of transfer advice. In its feedback statement, the FCA acknowledged that it had "*underestimated the challenge*" faced by firms to get PII cover, but that it is hopeful that the guidance can help the market in achieving good advice on a consistent basis, that should eventually be reflected in lower PII charges. It remains to be seen if the initial contraction in the DB transfer advice market will continue or settle down as firms get comfortable with the guidance.

For trustees, the joint guide issued by the FCA and tPR is also causing concern. The suggestion is that giving members illustrative figures in a transfer pack that compare the outcomes a member might get if they keep safeguarded benefits or transfer/convert to flexible benefits might be construed as trustees undertaking a regulated activity for which they should be authorised. The guidance does however outline the circumstances where illustrative figures can be used (e.g. showing the effect of giving up pension increases and signposting reliable sources of independent information such as annuity comparison tools on the Money and Pensions Service website).

12. FCA CONSULTS ON STRONGER NUDGE TO PENSIONS GUIDANCE

On 4 May 2021, the FCA published a consultation on new rules to implement provisions of the Financial Guidance and Claims Act 2018 ("**FGCA**"). The consultation closed on 29 June 2021 and the final rules are expected later this year. The FGCA requires the FCA to make rules for pension providers to ensure consumers have either received or opted out of receiving Pension Wise guidance, when they apply to access or transfer their pension savings. While Pension Wise appointments aren't mandatory (legislators having been concerned that compulsory appointments could be perceived by consumers as a barrier to accessing pensions rather than beneficial), there remains concern about low take-up. The FCA is therefore also seeking feedback as to how to increase the take-up of Pension Wise beyond the proposed new rules.

The proposed rules give consumers a final opportunity to take Pension Wise guidance at the point they wish to access their pensions savings, with the proposed rules requiring pension providers to:

- Refer the consumer to Pension Wise guidance.
- Explain the nature and purpose of Pension Wise guidance and encourage the consumer to take the guidance.
- Offer to book a guidance appointment and where the consumer accepts that offer, book the appointment or provide the consumer with sufficient information to book their own appointment.

The proposed rules will also require providers to confirm and record whether the consumer declined the offer to receive the Pension Wise guidance or received it, or received regulated advice.

13. AXMINSTER: REVISITING FORFEITURE

In this case, the High Court (Morgan J)[6] was asked to approve a compromise agreement which had been reached between the parties on various issues including concerning the validity and effect of certain deeds which purported to fix the rates of pension increases under the scheme. In doing so, the case raised further issues including questions as to limitation, forfeiture of unpaid pensions and interest, with the court finding as follows:

Limitation	Consistent with the finding in *Lloyds*, the statutory limitation period under section 21 of the Limitation Act 1980 **does not apply** to a claim by a pension scheme beneficiary brought against a current scheme trustee seeking payment of arrears of pension. Nothwithstanding that scheme members have no proprietary interest in specific assets of the scheme, such a claim would be covered by section 21(1)(b) of the Limitation Act 1980 as being an acition to recover from the trustee trust property because of their interest in the trust property in the broader sense.

[6] Morgan J being the judge from the Lloyds GMP equalisation hearings.

Forfeiture	Only the second of two potential rules was held to be a forfeiture rule, being the rule which provided that unclaimed monies "*shall be forfeited*" with a trustee a discretion to pay them to the beneficiary regardless or use them for other purposes. The other rule considered simply enabled the trustee to apply monies which hadn't been claimed for 6 years in certain ways.
Exercise of Discretion	The court noted that under the rules the discretion to pay forfeited unclaimed monies to a beneficiary was a trustee discretion and not a court discretion. While rejecting the idea the arrears could not ever be forfeited (e.g. there could be administrative difficulties in paying them), the court noted that the "first reaction" of the trustee where members were not at fault should be to pay arrears without delay (although the court noted that the relevant rule did not impose an obligation on the trustee to act in that way and noted the trustee retained a power to act, or not to act, in that way). Other factors which may be relevant could included presence of fault on the part of the trustee, whether the members could reasonably have been expected to make claims sooner and the fact the scheme would be transferring to the PPF.
Interest	The court can award interest on equitable compensation and the appropriate rate in relation to arrears of pension increases was held to be 1% above base (again consistent with *Lloyds*), nothwithstanding that it is settled law that claims for arrears of an annuity do not bear interest.

Trustees will of course be interested in the court's views on trustees' exercise of discretion when considering paying arrears of pension in the context of a forfeiture rule, but should remain mindful that it is settled law that where the trustees have a discretion, such discretion is for the trustees to exercise taking into account all relevant factors and disregarding irrelevant factors.

14. EMPLOYER'S APPEAL UPHELD IN BRITVIC RPI CASE

In this case, the employer had sought clarification as to whether it could cut the rate of future increases in accordance with a rule providing for such increases to be in line with the Retail Prices Index ("**RPI**") capped at 2.5% or 5% (depending on date of service) "*or any other rate decided by the principal employer*". The High Court had decided that the employer could not reduce the pension increase rate and only use this discretion to apply a higher rate. The judge took the view that it was clear from the materials produced that the commercial context meant the draftsperson had in mind only increases when drafting the phrase "*or any other rate*", i.e. they had used the word "*other*" when they really meant "*higher*". The employer appealed.

On 10 June 2021, the Court of Appeal issued its judgment unanimously agreeing to uphold the employer's appeal, deciding that the words allow the employer to fix a rate of increase that is higher or lower than the cap. Broadly, this was on the basis that:

- unless the wording was ambiguous/unclear, the court had to apply it – here the words were clear;
- there was no evidence (and no basis for concluding) that the drafter had made a mistake;
- while the factual matrix and the commercial consequences should not be ignored, the question as to which interpretation was more consistent with business common sense should not be asked unless there are two rival interpretations available – here there were not;
- no other part of the deed or background material suggested the words could or should mean anything other than what they said.

It is worth noting however that there were member communications indicating that increases of 5% LPI were guaranteed (with an employer power to give discretionary increases on top) which the court acknowledged did indicate a mismatch between what members were told and what the rules provided. Nevertheless, this did not justify the inference that the mistake was in the drafting of the rule (which reproduced an existing rule), given the mistake may equally have been in the drafting of the member communications.

15. JUDICIAL REVIEW OF RPI ALIGNMENT WITH CPIH

The trustees of the BT Pension Scheme, Ford Pension Scheme and the Marks and Spencer Pension Scheme are seeking a judicial review of the government's decision to align RPI with the Consumer Prices Index including owner occupiers' housing costs ("**CPIH**") from 2030. It is expected that aligning RPI with CPIH may negatively affect defined benefit pension schemes and their members (e.g. if the value of assets relative to liabilities falls where RPI index-linked gilts or other assets are being used to hedge CPI liabilities, and noting that pension increases are often linked to RPI).

"*We believe that it is right to take this action in the form of a judicial review to ensure our position is considered and that the value and security of members' pension benefits is protected.*"

Graham Oakley, Chairman of the Trustee Board (M&S)

16. HMRC: TAX AVOIDANCE AND UNFUNDED PENSION ARRANGEMENTS

On 14 June 2021, HMRC published Spotlight 58 stating that it is aware of tax avoidance arrangements used by owner managed companies and their directors to reward a director for the services they provide to a company, in such a way that seeks to avoid paying Income tax and National Insurance contributions, while obtaining Corporation Tax relief at the same time. HMRC's strong view is that these arrangements, which broadly create an unfunded pension obligation to a director that is subsequently transferred (for payment) to a third-party (often the director's relative or a colleague), do not work. HMRC says that it intends to challenge anyone promoting or using these arrangements and that it will "*investigate the tax affairs of all users*".

In terms of penalties, HMRC highlights:

- The possibility of penalties for inaccurate returns, including carelessness penalties for returns submitted after certain dates;
- The general anti-abuse rule for arrangements entered into after 16 July 2013; and
- Implications for promoters, including penalties for enablers and action under the promoters of tax avoidance schemes regime.

C L I F F O R D
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