



Institute
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Six of one, half a dozen of another....

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Six of one, half a dozen of another....

Agenda

- Cases
 - IBM (2014 and 2015) – scheme change exercises
 - Merchant Navy Ratings Pension Fund (2015) – trustee duties/s.75
 - Olympic Airlines (2015) – overseas sponsoring employer/PPF entry
- VAT on pension fund costs



IBM UK Holdings v Dalglish [2014/15]

Key facts

- Three scheme change exercises (2004-05, 2005-06, 2009-11)
- US parent pushing IBM UK to close defined benefit schemes (to hit earnings per share target)
- Proposed to close via new employer power
- Members pressed to sign non-pensionability agreements
- Short “window” to take early retirement before existing (generous) terms withdrawn



IBM UK Holdings v Dalglish [2014/15]

High Court decision – liability judgment

- Member “exclusion powers” were valid and could be used to close schemes to DB accrual but exercise of them was subject to *Courage* restriction in power of amendment
- IBM’s handling of changes breached
 - pensions law duty of good faith towards members
 - employment law duty of trust and confidence



IBM UK Holdings v Dalglish [2014/15]

High Court decision – liability judgment

- Members were entitled to hold “reasonable expectations” regarding future DB accrual (based on earlier statements by IBM)
- Insufficient case for closure
- IBM had not consulted with an open mind



IBM UK Holdings v Dalglish [2014/15]

Remedies judgment

- Exclusion notices voidable
- Non-pensionability agreements unenforceable
- Member damages
- Employer required to undo majority of benefit changes
- Appeal?
- Further ongoing hearings



IBM UK Holdings v Dalglish [2014/15]

Points to note

- Check for past promises
- Openness/transparency vital
- Approach consultation with an open mind
- Test the business case – is it robust?
- Give members time to consider proposals and options
- Internal communications are just as important as those with members
- Sanctions for failing to act in accordance with duties of good faith/trust and confidence can be severe



Merchant Navy Ratings Pension Fund [2015]

Key facts

- Non-sectionalised industry-wide multi-employer scheme
- Trustee introduced new employer contribution regime in 2001
- Key terms of regime:
 - liability for employer contributions rested solely on 40 companies employing active members of the Fund as at 1999
 - no contributions required from around 200 employers who stopped employing active members before 1999
 - the Fund was closed to the future accrual of years of pensionable service with effect from 2001, although certain members continued to receive enhanced revaluation of their accrued benefits



Merchant Navy Ratings Pension Fund [2015]

Key facts

- Contributing employers questioned why they should cross-subsidise the pension deficit payments of historic employers (their commercial competitors)
- This led to proceedings in 2009 in which it was held that the Trustee had the power to amend the rules of the Fund so as to introduce a deficit repair regime which required contributions from all employers
- The Trustee asked for the Court's confirmation regarding the specific terms of the new regime



Merchant Navy Ratings Pension Fund [2015]

Key facts

- In considering the specific issues for this scheme, the Court had to answer three more general questions:
 - What duty do pension scheme trustees owe beneficiaries?
 - To what extent can trustees take employers' interests into account when making decisions?
 - For the purposes of the section 75 debt regime, is a scheme “frozen” if members cease to accrue years of pensionable service but continue to receive enhanced revaluation of their benefits?



Merchant Navy Ratings Pension Fund [2015]

Judgment

- What duty do pension scheme trustees owe beneficiaries?
 - Previously understood that a trustee's main duty was to act in the best interests of beneficiaries.
 - MNRPF held that the trustees' duty to act "in the best interests of beneficiaries" is a re-formulation of the duty to "promote the purpose for which the trust was created".
 - Members' "best interests" are decided within the limits of their scheme's rules and the benefits they were intended to receive. In practice, this element of the case marks a change of wording rather than approach.



Merchant Navy Ratings Pension Fund [2015]

Judgment

- To what extent can trustees take employers' interests into account when making decisions?
 - Provided: (a) the primary purpose of securing members' benefits due under the scheme is furthered, and (b) the employer covenant is strong enough to fulfil that purpose, the trustees could (but were not obliged to) take account of employers' interests when deciding the scope of the scheme's deficit contribution regime
 - Trustees were not required to adopt the lowest risk funding regime possible
 - Trustees should be wary of any suggestion that they are now *required* to take employers' interests into account when reaching decisions - this goes beyond the scope of the judgment



Merchant Navy Ratings Pension Fund [2015]

Judgment

- For the purposes of the section 75 debt regime, is a scheme “frozen” if members cease to accrue years of pensionable service but continue to receive enhanced revaluation of their benefits?
 - It was hoped that the judgment might resolve a long-running debate in the pensions industry: were members with a retained final salary link “active” for the purposes of the section 75 debt regime?
 - The judgment did not address this question directly
 - Conclusions drawn are largely confined to the facts of the case
 - However, there may now be scope to argue that only members who continue to accrue years of pensionable service should be considered “active” for the purposes of the section 75 debt regime, and so members with a Courage-type final salary link do not fall within this definition



Olympic Airlines [2015]

Key facts

- UK defined benefit pension scheme – buy out deficit around £16m
- Overseas principal employer – Greek company
- Greek insolvency event – 2 October 2009
- Scheme winding up triggered
- UK winding up petition presented by the trustees on 22 July 2010 – to try and procure a qualifying Insolvency Event to trigger PPF entry



Olympic Airlines [2015]

The court sequence up to 2015

- Trustee winding up petition presented in July 2010
- High Court hearing: May 2012
- Court of Appeal: June 2013
- Supreme Court: April 2015



Olympic Airlines [2015]

The outcome (up to the Court of Appeal judgment)

- Trustee winding up petition presented in July 2010 – “secondary proceedings” under European Law
- The requirement for an “establishment”
- Some form of business operation required – i.e. economic activity
- Not sufficient to be merely winding up the UK activities of the business
- Scheme not eligible to enter the PPF



Olympic Airlines [2015]

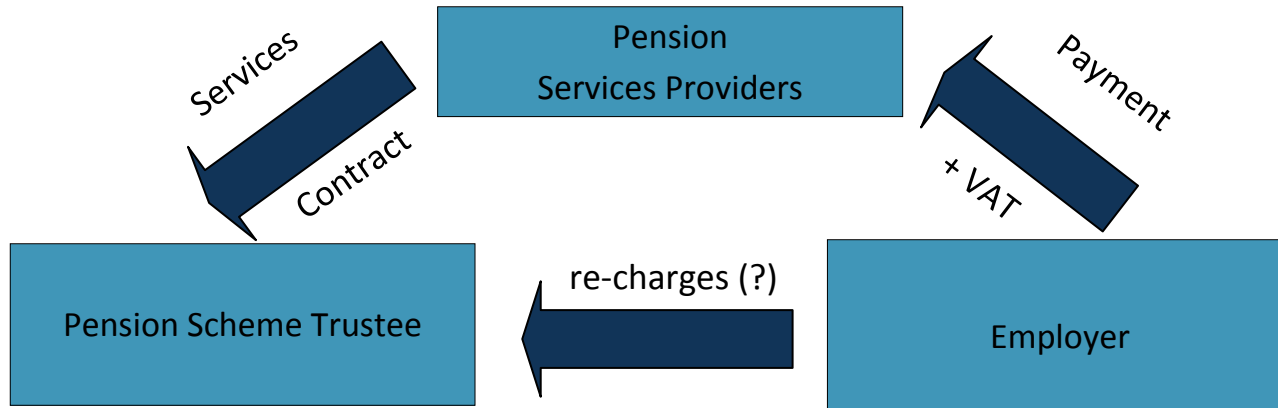
However.....

- Parliament passed amending legislation to create an additional type of insolvency event under the PPF legislation
 - this applies to the Olympic Airlines scheme (and probably only that scheme)
- So the Olympic Airlines scheme entered PPF assessment with effect from 2 October 2014
- Supreme Court proceedings in 2015 – pursued by the Trustees
 - scheme went into winding up in 2010
 - PPF assessment date relevant to possible claw backs
 - 2 October 2014 assessment date maintained (not 29 May 2012)



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VAT and Pension Costs



VAT and Pensions – The old world

HMRC's Notice 700/17

- VAT on pension fund administration was input tax of the employer
- VAT on pension fund investment activity was input tax of the trustees and not recoverable by the employer
- Combined supplies of investment and administration could be split 70:30 on single invoice



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European Case Law

- *Wheels* – defined benefit pension scheme, no VAT exemption
- *PPG* – VAT recovery by employer
- *ATP* – nature of defined contribution type schemes, VAT exemption



HMRC Briefs – the new world

- 6/14 - HMRC withdraw VAT on pensions policy and begin transition away from 70/30 split
- 22/14 & 43/14 - HMRC confirmed VAT is deductible by employer if services are provided to employer and extended the transitional period to 31 December 2015
- 44/14 – HMRC recognised that management of defined contribution type funds should benefit from VAT exemption
- 8/15 - employers may recover the VAT paid on pension fund management services provided to DB pension funds through a tripartite arrangement



The options to mitigate VAT costs

- Tripartite arrangements (but further HMRC brief awaited – due summer 2015)
- VAT Groups
- Recharging by employer to pension scheme
- What should employers and trustees be doing?



Pensions Act 1995 considerations

- Section 47 requires trustees of pension funds to appoint various advisers including: actuaries, lawyers and auditors
- Regulations prescribe certain requirements as to the manner and terms of appointment
- Civil penalties for non-compliance or reliance on advisers who have not been properly appointed
- Fund manager appointment can be made “on behalf of trustees”



Questions

Comments

Expressions of individual views by members of the Institute and Faculty of Actuaries and its staff are encouraged.

The views expressed in this presentation are those of the presenter.



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