

Current Issues in Funding

5 November 2007
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ALLEN & OVERY LLP
London

Part 3 (Scheme Funding) Pensions Act 2004

What am I going to cover?

- Analysis of roles of Trustees/Employer/Actuary/Regulator
- Where do the scheme rules fit in?
- What does the law say about conflicts of interest?
- Legal issues on the horizon?

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The Trustees' role: A recap

- Set the Statutory Funding Objective (SFO) (s222)
- If SFO not met, prepare a recovery plan (s226)
- Prepare/review schedule of contributions to meet the SFO by the end of the recovery plan (s227)
- Prepare/review Statement of Funding Principles (s223)
- Report to the Regulator (s226 (recovery plan), s227 (schedule of contributions), s228 (failure to make payments), s229 (failure to agree))

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The Trustees' role: What legal issues arise?

- Technical provisions: Has prudence been a problem?
- Technical provisions: Changing the assumptions?
- Assessing the Employer covenant: Which Employer?
- What does the Regulator expect: New clearance guidance?

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The Actuary's role: A recap

- Advise the Trustees on technical provisions, SFP, recovery plan and schedule of contributions (s230)
- Certify the technical provisions (s225)
- Certify the schedule of contributions (s227)
- Whistleblow to the Regulator (s225 and s227)

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The Actuary's role: What legal issues arise?

- What are Actuaries certifying?
 - Technical provisions
 - Schedule of contributions
- Contingent security: Funding outside the scheme?

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The Employer's role: A recap

- Agree the technical provisions, SFP, recovery plan and schedule of contributions (s229(i))
- Debt due from Employer if failure to make payment under schedule of contributions (s228(3))

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The Employer's role: What legal issues arise?

- What if agreement not reached?
- Alternative Dispute Resolution

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The Regulator's role: A recap

If there has been a failure by the Trustees, Employer or Actuary to comply with an obligation, the Regulator may:

- Set the technical provisions
- Impose a schedule of contributions
- Modify the scheme as regards future accrual (s231)

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The Regulator's role: What legal issues arise?

- What are the Regulator's powers if he does not like what has been agreed?
- On what basis would technical provisions be set?

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Where do the scheme rules fit in?

- Statutory provisions: Regulation 5, 8 and Schedule 2
- British Vita case

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Regulation 5, 8 and Schedule 2

| Rules of the scheme | Effect of legislation |
|--|---|
| Trustees have power to determine the contribution rate + No other person has the power to reduce or suspend contributions | Trustees required to only consult the Employer |
| Trustees have power, subject to conditions, to determine the contribution rate + No other person has the power to reduce or suspend contributions | If the conditions are satisfied, Trustees required to only consult the Employer |
| The contribution rate is determined by, or on the advice of, a person other than the Trustees or the Employer | Trustees must obtain Employer's agreement . Trustees must take into account the recommendations of the other person on the method and assumptions for calculating the technical provisions and the preparation of any recovery plan. Additional requirements on certification of schedule – no lower than the Actuary would have provided if the Actuary had been responsible for preparing the schedule, statement of funding principles and any recovery plan. |

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British Vita

- Does Part 3 Pensions Act 2004 replace the scheme's own contribution powers?
- S306 – does Part 3 “conflict” with the rules?
- Before schedule of contributions takes effect – “No”
- After schedule of contributions takes effect – “Don't know”
 - S228(3) – implies powers under rules still apply
 - Reg 10(1) - schedule of contributions to show **all** contributions
 - Employer would not agree so what would Regulator do?
- Should Employers exercise power to suspend contributions?

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Conflicts of Interest

- Can senior management act as Trustees?
 - Conflicts not inherent in all decisions
 - Problem of confidential information:
North & South Trust v Berkeley
 - Act before there is a problem
- Companies Act 2006 S175
 - 1 October 2008: Board Authorisation?

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What new legal issues are coming?

- IFRIC 14: Mandatory from 1 January 2008
 - Access to surplus?
 - Impact of minimum funding requirement
 - Impact on funding targets
- Solvency II
 - 2008 EU law/2012 Implementation
 - Levelling the playing field – new buyout vehicles
 - End of Employer sponsored final salary pension schemes?

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