

Risk Areas and hot topics

Legal risks for Actuaries and Consultants

Where will future claims be coming from?

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Agenda

- Professional negligence basics
- Pensions Ombudsman key risk areas
- Actuary
- Administrator
- Pensions Consultant
- Investment Consultant
- Hot Topics



Risk Areas and hot topics

Professional negligence basics



Professional negligence basics

- Contract v Negligence
 - Terms of engagement / contract
 - Often the same, but differences:
 - Limitation
 - Measure of damages
 - Contributory negligence
- Negligence
 - Duty
 - Breach
 - Causation/loss



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Professional negligence basics

- Duty
 - Duty to persons other than client?
 - Employer and Trustee?
 - Third parties?
 - *Precis v Mercer [2005]*



Professional negligence basics

- Breach of duty
 - *Bolam v Friern Hospital Management Committee [1952]*
- Causation and loss
 - Did the breach cause the loss?
 - Who suffers the loss?
 - Calculation of loss
 - Ongoing funding or buy-out



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Professional negligence basics

- Maladministration
 - wide jurisdiction
 - wide definition

Practical Considerations

- Risk awareness generally
- Full review of scheme when take it on
- Always check the scheme rules
- Record advice and retain important documents (including terms and conditions)
- Terms and conditions



Risk Areas and hot topics



The Pensions Ombudsman’s top 5

| 2010/11 | | % |
|---------|-------------------------------|---------|
| 1. | (1) Ill-health pensions | 13 (11) |
| 2. | (3) Transfers | 10 (6) |
| 3. | (5) Calculation of benefits | 6 (5) |
| 4. | (-) Early retirement pensions | 5 (3) |
| 5. | (2) Misleading advice | 5 (9) |
| 6. | Other | 45 (33) |

Source 20010/2011 Annual Report



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Risk Area: Actuarial calculations and assumptions

- Actuarial valuations
 - Assumptions themselves rarely challenged
 - Explaining the assumptions
 - Lose a set of members
 - Loss (for trustees) is hard to prove
- Employers - Section 75
 - *Cornwell v Newhaven 2005*
- Duty to PPF

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Risk Area: Overpayments

- Mitigation of loss
- Ability to recover
- Defences
 - Change of position
 - *Scottish Equitable v Derby [2001]*
- What amounts to a “change of position”?

Risk Areas and hot topics



Risk Area: Documentation

- Foundation of pension scheme
- Formalities
 - Amendment usually requires a deed
 - *Hodgson v Toray Textiles (2006)*
 - *TSL v Dubery (2006)*
 - English High Court: very restrictive approach
 - *Walker Morris Trustees v Masterson (2009)*; but
 - *Low and Bonar plc v Mercer (2010)*
 - *Foster Wheeler*
- Restrictions
 - *HR Trustees v German [2009]*
- Booklets and Announcements
 - *Steria v Hutchinson (2006)*



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Risk area: DB to DC conversions

- Same rules apply
- IMG case - will the Courts still be as strict when FAS/PPF are picking up the bill?



Risk area: Indexation

- 1997 – 5% LPI – many schemes kept 3% collar
- 2005 – 2.5% LPI
- 2010 - CPI



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Risk area: Defective Documents – legal remedies

- Construction – What does it really mean? Courts will try to be “Practical and purposive”
- Rectification – Document fails to reflect the parties’ true intentions
 - High evidential hurdle but getting lower
 - Only the court can rectify
 - Can be retrospective
- Hastings-Bass – now Futter v Futter (2011)
- Only available when ultra vires
- Otherwise – sue the adviser



Risk area: Ill health

- Biggest problem area with the Ombudsman
- Expensive and emotive
- No excuses
- Check the rules
- Let the member comment on the medical report
- Apply the rules
- Give the reason



Risk Areas and hot topics



Investments – inherently risky

- Claimant always has 20:20 hindsight
- Investment consultants rarely guarantee performance
- Statistical models – are they really so scientific?
- Complex financial products – do trustees (or consultants) really understand them?
- Implemented investment consulting – conflict of interest?



Risk Areas and hot topics



Equalisation

- Sex equalisation in 1990s still causing claims
- Test Achats 2012 – will proxies for sex work?
- GMP Equalisation still to be sorted
- Age discrimination??

Risk Areas and hot topics

Conflicts

- TPR increasingly concerned
- Can the Y model survive?

Employer's Duty of Good Faith

- Imperial Tobacco (1990)
- Prudential (2011)
- Change in policy on discretionary increases not a breach

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Tax issues

- Simplification?
- Lower lifetime allowance/annual allowances will affect more people
- PIPs
- EFRBS



Money Purchase

- Members who cannot afford to retire will not be happy
- Claims in US
- Set out the risks
- Do you allow members off piste?
- Default options/lifestyle need most attention
- What is money purchase anyway?



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Money Purchase

- Bridge v Yates – Supreme Court - July 2011
- KPMG correct – building block schemes are not money purchase
- Money purchase schemes can be in deficit
- Eg internal annuitisation or guaranteed investment returns
- DWP considering new legislation
- “Chaos or Chaos?” Mummery LJ



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