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## Scheme Funding: Legal Issues

Edwin Mustard, Shepherd and Wedderburn

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## Scheme Funding: Legal Issues

Agenda

- trustee and employer powers
- interaction of legislation with scheme rules
- prudence
- conflicts of interest
- negotiating with the employer
- the Pensions Regulator in practice



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## Trustee and Employer Powers

Scheme Contribution Rules

Trustee friendly rule

Balanced rule

Employer friendly rule



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## Trustee and Employer powers

Impact of SSF on contribution rule:

- Part 3 of Pensions Act 2004 – overriding
- SSF is very prescriptive on process for:
  - statement of funding principles
  - schedule of contributions
  - recovery plan (if needed)
  - method of calculating technical provisions
- general position: joint company and trustee agreement

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## Trustee and Employer powers

- but obligation to consult employer on funding matters where:
  - trustees have sole power to set contributions
  - employer has no power to suspend or reduce contributions
- thorny issues:
  - role of actuary
  - one off contribution demands (British Vita case)

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## Employer and Trustee powers

British Vita case (subject to appeal):

- pre-first SSF schedule of contributions being put in place (trustees can exercise unilateral powers – one-off contribution demand)
- beyond this: law less clear

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## Prudence

- not defined in legislation
- what does it mean?
- depends on circumstances of scheme, looking at scheme in the round

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## Conflicts of Interest

- scheme funding: many new areas for employer and company's views to diverge
- most of time no conflict: aim is to deliver scheme benefits
- company directors and trustees: both fiduciaries
- duty of confidentiality for director?

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## Conflicts of Interest

Options for dealing with conflicts:

- resign
- abstain from decision making (delegation?)
- swap one director for another
- use of independent trustee
- seek company authority to release information

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## Negotiation with the Employer

- Pensions Regulator: strong message to trustees on negotiator role
- act like bank would negotiate over repayment of loan
- a new role for trustees: genuine negotiation/more proactive
- balance of power shift

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## Negotiating with Employer

Making Trustee negotiations more effective:

- understand employer covenant
- monitor activity (may need outside help)
- understand powers
- use of confidentiality agreements

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## Negotiating with Employers

Making employer negotiations more effective:

- understand role of trustees
- anticipate trustees' position/expectations
- forward planning (timescales)
- consider non-cash aspects in negotiation

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## The Pensions Regulator

- greatest active role in funding issues arising in corporate transactions
- less so for ongoing scheme issues
- but presence has an impact
- expectation of trustees protecting interests of the scheme

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