

Snapshot

March 2022

Overview

- **Pensions and Ukraine**
Against the backdrop of financial uncertainty caused by the situation in Ukraine, the Pensions Regulator (**TPR**) has issued [guidance](#). This sets out steps that Trustees should be taking in order to understand the impact of the war on their scheme and employer covenant. It also highlights that trustees should be reviewing their procedures in order to protect their members from increased risks of cyber-attacks and financial crime.
- **Potential changes to the new Conditions for Transfers Regulations?**
The new transfer regulations which place limits on when statutory transfers can take place may be amended to prevent low-risk transfers being flagged just because the receiving scheme has overseas investments.
- **Fraud victims granted relief to recover judgment debt from bankrupt fraudster's pension fund**
In the case of *Bacci and others v Green* the claimant victims of a fraud were granted relief by the court to recover a judgment debt from a pension fund held by the bankrupt fraudulent defendant. However, the circumstances which led to the court granting this relief are specific to the case and it is unlikely that there will be a raft of similar cases in the future.
- **Lack of knowledge is not a reasonable excuse for not preparing a Chair's statement**
In a case involving an appeal of a penalty notice issued for failure to prepare a Chair's statement, it was held that lack of knowledge in relation to the requirements for preparing a Chair's statement was not a reasonable excuse for non-compliance.

More information

Pensions and Ukraine

The impact of the situation in Ukraine is being felt throughout the world. This has been reflected clearly in stock market movements and oil prices. Some sponsoring employers may be more directly impacted if they have supply chains and/or customers in Russia or Ukraine.

Against this backdrop of uncertainty, TPR has issued [guidance](#) for trustees on steps they should be taking to understand the impact of the war on their scheme and to protect their members.

TPR cautions against any short-term actions given that pension schemes are long-term investments. There is, however, recognition that schemes with Russian assets may consider disinvesting. However, there are likely to be challenges with being able to sell such assets – in practice who would buy them and would they be worth anything? Trustees also need to be careful that they do not fall foul of the sanctions regime.

TPR expects trustees to consider:

- Short-term liquidity needs for defined benefit schemes.
- Whether the sponsor's business has been affected and, for defined benefit schemes, the impact this has had on employer covenant.
- The impact of the events on the scheme's investments, including short-/medium-term risks.
- Whether cyber security policies are adequate.
- Whether scheme processes to prevent financial crime, such as scams, need to be reviewed.
- Whether investments remain aligned with policies and principles in the statement of investment principles, particularly concerning economic, social and governance considerations.
- Whether and how to communicate with members regarding the steps taken by the trustees to manage risks to the scheme.

Potential changes to the new Conditions for Transfers Regulations?

In our [briefing](#) we discussed the new Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021 which put restrictions on the ability of trustees to make a statutory transfer when either an 'amber' or 'red' flag is present. The intention behind these regulations was to reduce the risk of transfers being made to scam arrangements.

If an amber flag is present, trustees cannot undertake a statutory transfer out until the member has taken advice from the Money and Pensions Advice Service. One of the ways that an amber flag is raised is if the trustees of the transferring scheme decide that there are "any overseas investments included in the receiving scheme". For these purposes 'overseas investments' is drafted very widely and covers investments "wholly or partly outside the United Kingdom".

The industry was quick to pick up on the potential for this flag to catch a large number of transfers, even those that pose a low risk of being a scam, due to the fact that most pension schemes are likely to have some degree of overseas investments.

As a result, the DWP may now amend these regulations to ensure that low-risk overseas investments are not caught by the new advice requirements.

Fraud victims granted relief to recover judgment debt from bankrupt fraudster's pension fund

In the case of *Bacci and others v Green* the claimant victims of a fraud were granted relief by the court to recover a judgment debt from a pension fund held by the bankrupt fraudulent defendant. However, the circumstances which led to the court granting this relief are specific to the case and it is unlikely that there will be a raft of similar cases in the future.

FundingSecure Ltd (**FSL**) had provided the defendant, Mr Green, with finance which was dishonestly obtained. In particular, Mr Green offered FSL security by means of mortgages over works of art that he either did not own or had sold. FSL obtained judgment and a worldwide freezing order against Mr Green. However, FSL then entered administration and Mr Green was made bankrupt. The claimants took an assignment of FSL's judgment debt of more than £3.2m and, because the judgment against Mr Green was based on fraud, the debt survived his bankruptcy. In addition, Mr Green's rights under the Richard Green (Fine Paintings) Executive

Pension Scheme (the **Pension Scheme**) did not fall into his bankruptcy estate. The only asset against which the claimants could enforce the judgment debt was therefore the Pension Scheme.

The claimants:

- applied to the court for directions that Mr Green delegate to the claimants' solicitors his powers to notify HMRC that he was revoking his Enhanced Protection in relation to his lifetime allowance and his right to call for a lump sum and a pension under the Pension Scheme; and
- sought authority to exercise those delegated powers and then to seek to recover the judgment debt by drawing down from the Pension Scheme funds by means of a third party debt order.

The court concluded that there was an overriding public policy consideration that fraudsters should not prosper from or avoid enforcement by the use of pension funds. An order in the terms sought by the claimants was therefore granted.

It is not normally possible to obtain a third party debt order in respect of funds held by a judgment debtor in a pension scheme because those funds do not constitute debts due and payable to the judgment debtor. The forcible delegation to the claimants of the defendant's powers in relation to the Pension Scheme was a novel way of overcoming this problem. However, the threshold for the court to make this sort of order appears to be cases in which a receiver would be appointed by the court under section 37 of the Senior Courts Act 1981. As such, these sorts of orders are likely to be applied in fairly limited circumstances.

[Lack of knowledge is not a reasonable excuse for not preparing a Chair's statement \(*Ease & Co \(Banquette Seating\) Ltd v TPR*\)](#)

In this case the appellant was a furniture company with a sole director. The company was also the trustee of a defined contribution pension scheme of which there were three active members. The pension scheme fell within the definition of "relevant scheme" for the purposes of being required to prepare a Chair's statement (the statutory requirement to prepare an annual governance statement).

No Chair's statement was prepared for the scheme year ending 31 March 2019 and TPR therefore issued a penalty notice to the trustee of the pension scheme (at the lower end of the scale in the amount of £500.30). The trustee made an appeal in relation to the issuing of the penalty notice to the General Regulatory Chamber of the First-tier Tribunal. The trustee challenged the penalty notice on the grounds that failure to prepare the Chair's statement was unintentional and down to lack of knowledge of the complex regulatory requirements.

The Tribunal found that the penalty notice was validly issued and the statutory requirement for trustee knowledge and understanding under the Pensions Act 2004 was clear and unequivocal. On this basis the appellant could not succeed in the argument made as the legal requirement applied across the board and no exemption was applicable.

The outcome of this case is perhaps not surprising. Whilst highlighting the obvious point that lack of knowledge of statutory requirements is not an excuse for non-compliance, it also serves

to underline the fact that increasing regulatory requirements in relation to defined contribution pension schemes can have a disproportionate impact on smaller schemes. However, given the drive towards consolidation (particularly in relation to defined contribution schemes), the application of this increased regulatory burden without nuance is perhaps not unintentional.

Contacts



GRAHAM WRIGHTSON

PARTNER, Pensions

T: +44 20 7809 2557

E: Graham.Wrightson@shlegal.com



DAN BOWMAN

ASSOCIATE, Pensions

T: +44 20 7809 2556

E: Daniel.Bowman@shlegal.com

This note does not constitute legal advice. Information contained in this document should not be applied to any particular set of facts without seeking legal advice. Please contact your usual Stephenson Harwood pensions law group member for more information.

© Stephenson Harwood LLP 2022. Any reference to Stephenson Harwood in this document means Stephenson Harwood LLP and its affiliated undertakings. The term partner is used to refer to a member of Stephenson Harwood LLP or a partner, employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Stephenson Harwood LLP's affiliated undertakings.

Full details of Stephenson Harwood LLP and or/its affiliated undertakings can be found at www.shlegal.com/legal-notices.

Information contained in this document is current as at the date of first publication and is for general information only. It is not intended to provide legal advice.