TRAVERS SMITH

What's happening in Pensions

Issue 39 *May 2013*

In this issue:

Pensions Bill

The Government has published the Pensions Bill. Much of its content had previously been published in draft form (see **WHiP Issue 38**) but there are some important new clauses. We cover some of its contents under separate topic headings below. The Bill will also:

- Give the Government power to make regulations to the effect that a scheme is not a "qualifying scheme" for automatic enrolment purposes if administration charges imposed on members:
  - are different for active and deferred members;
  - are of a prescribed class (this is intended to catch the practice of some employers passing on, as member charges, the fees they pay to consultants for help with setting up a scheme); or
  - exceed a prescribed level.

  There will be a consultation this autumn on what should be prescribed for these purposes. This is expected to include a proposal to cap charges under default investment funds.
- Give the Government a power, exercisable for seven years, to make regulations prohibiting incentivised transfers from DB pension schemes. It is intended that this will be exercised if the voluntary code of good practice (see **WHiP Issue 34**) is not being followed.
- Permit the Pensions Regulator to allow schemes with four or fewer members to submit scheme returns every five years (rather than three).
- Bring forward the increase of state pension age from 66 to 67, so that this occurs between 2026 and 2028 instead of between 2034 and 2036.

Pensions Bill:
https://www.gov.uk/government/organisations/department-for-work-pensions/series/pensions-bill

Scheme funding

New statutory objective for the Pensions Regulator

The Pensions Bill includes the proposed language for the Pensions Regulator's new statutory objective in connection with scheme funding (see **WHiP Issue 38** for background). The proposed objective, when the Regulator is exercising its functions in relation to scheme funding only, is *"to minimise any adverse impact on the sustainable growth of an employer"*.

Pensions Bill (see clause 42):
https://www.gov.uk/government/organisations/department-for-work-pensions/series/pensions-bill

Pensions Regulator: DB annual funding statement

The Pensions Regulator has issued its 2013 "Defined benefit annual funding statement". The statement sets out the Regulator's views on acceptable approaches to the valuation process in the current economic environment. It is primarily aimed at schemes undertaking valuations with effective dates from 22 September 2012 to 21 September 2013.

Press release:
http://www.thepensionsregulator.gov.uk/press/pn13-17.aspx

Its tone is softer than last year's statement. The key points include:

- The funding legislation permits flexibility in setting discount rates for determining technical provisions and/or the investment return assumption used in the recovery plan. Trustees may vary the assumptions made for the relative returns of different asset classes compared to previous valuations.
- As a starting point, trustees should consider whether the current level of employer deficit contributions can be maintained. They should take into account what is reasonably affordable for the employer. Where there are significant affordability issues, trustees may need to consider whether it is appropriate to agree lower contributions and this may also include a longer recovery plan.
- Trustees should allow for an appropriate level of risk to be taken that is neither overly prudent nor overly optimistic.
- Trustees should document their reasons for making changes and consider any increase in risk.
- The Regulator is moving away from setting triggers focused on individual items - such as technical provisions or recovery periods of more than ten years - and will continue to evolve a suite of risk indicators.
- On employer covenant, the Regulator says:

> *"A strong and ongoing employer alongside an appropriate funding plan is the best support for a scheme. Where there is tension between the need for scheme contributions and for investment in the employer's business, it is important that the solution found neither damages the employer's covenant nor benefits other stakeholders at the expense of the scheme. If investment in the business is being prioritised at the expense of what otherwise would have been affordable contributions, it is important that it is being used to improve the employer's covenant. The treatment of the pension scheme should be compared to that of other stakeholders, taking account of their priority ranking, and continue to reflect the scheme's status as a creditor to the employer."*

As with last year, the Regulator intends to engage proactively with a small number of schemes "*to gain greater insight into scheme circumstances*".

In the autumn, the Regulator will consult on revisions to its code of practice on scheme funding as well as on its approach to the regulation of DB schemes, reflecting its new statutory objective (see above). It will also set out how it plans to take that objective into account in its regulatory approach.

The consultation paper will also discuss the Regulator's expectation that trustees will operate "integrated risk management", under which the employer covenant, investment strategy and scheme funding are all considered together. The funding statement says that trustees should:

> *"take an integrated approach to addressing covenant, investment, and funding risks and to be in a position to evidence how this has been done. This evidence need not be an undue burden or additional exercise but could be part of the development of good governance by demonstrating a sound risk management approach for the scheme. Advice should be sought where it is needed, including where appropriate, an assessment of the strength of the employer covenant."*

The Regulator also published supporting analysis and evidence and a research report on its 2012 funding statement.

Abolition of short service refunds / automatic transfers

Press release:
https://www.gov.uk/government/news/we-cant-let-peoples-hard-earned-pensions-go-to-waste

The Government has announced, in a Command Paper to Parliament, that it will proceed with its proposal (see **WHiP Issue 35**) to abolish short service refunds of member contributions from DC schemes. It intends to do this sometime in 2014, using the Pensions Bill. DB schemes will not be affected *"at this stage"* (but there are relatively few DB members affected anyway).

Pensions Bill (see Part 4):
https://www.gov.uk/government/organisations/department-for-work-pensions/series/pensions-bill

It will also proceed with its proposal for automatic transfers of small DC pots to a member's new employer's workplace pension scheme. The framework legislation has been included in the Pensions Bill, with forthcoming regulations to flesh out the detail. It is not yet clear when this will be implemented – probably after the abolition of short service refunds.

The automatic transfer regime would:

- apply to "pure DC" pots (ie, "money purchase benefits" as that term will be redefined by the Pensions Act 2011 when it is brought into force, perhaps in October 2013);
- apply to DC pots of less than £10,000 (initially);
- require transfers to be made to "pure DC" trust-based and contract-based workplace pension schemes that meet prescribed quality requirements;
- apply only where the DC pot first began to accrue after a prescribed date (which has yet to be decided);
- require transfers probably on a periodic basis (ie, at set regular intervals, not as and when contributions cease in respect of an individual member) but this has not been decided.

The process would involve either a "pot-matching" centralised clearing system (the Government's preference) or a process whereby members would be given a form when ceasing to accrue which they give to their next employer (ie, much like a PAYE P45 form).

Members would be able to opt out of the transfer. The Pensions Regulator would have enforcement powers and the Pensions Ombudsman would have jurisdiction over complaints.

It seems that the automatic transfer process may also apply to existing small deferred DC pots (which was not originally proposed) but this is not clear.

Automatic enrolment: consultation on proposed improvements

Consultation:
http://www.dwp.gov.uk/consultations/2013/ae-tech-changes-draft-regs.shtml

The Government has consulted on draft regulations and proposals to amend primary legislation that are designed to make compliance with the automatic enrolment regime less onerous. They would take effect from April 2014, or perhaps earlier for some amendments. There will be no retrospection, so employers must comply with the existing law until the amendments take effect.

Please see our briefing note **New requirement to enrol workers in a pension scheme** for background on the automatic enrolment requirements.

The proposals covered by the draft amending regulations are as follows.

- **Pay reference periods for assessing worker category**

  Worker category (ie, eligible jobholder, non-eligible jobholder or entitled worker) is currently assessed by reference to whether a worker is paid above the earnings trigger in an actual pay period, normally a calendar month or week. Some employers have difficulty in identifying from their payroll which category a worker falls within because their PAYE payroll systems look at pay in periods based on tax months (eg, 6 April to 5 May) or tax weeks (eg, 6 April to 12 April), even if the worker is actually paid by reference to a calendar month or week.

  Employers are therefore to be allowed, if they wish, to use tax months or weeks (depending on the worker's pay reference period) to determine what category a worker falls within, as an alternative to using the existing statutory method (but apparently not for calculating contributions).

- **Pay reference periods for assessing DC scheme quality**

  The pay reference periods for assessing DC scheme quality are different from those used to assess worker category. They are the 12 month periods from the employer's staging date to each anniversary of that date (NB the first period is shorter than 12 months for new joiners, other than those who start work on an anniversary of the employer's staging date).

It is possible for qualifying earnings assessed over a 12 month period to exceed the aggregate of qualifying earnings assessed by reference to monthly or weekly pay reference periods. This can occur, for example, if a bonus payment causes pay in a pay reference period to exceed the upper end of the qualifying earnings band for that period. This currently requires annual reconciliations to be performed.

Employers are therefore to be allowed, if they wish, to use actual pay periods to assess scheme quality (including the alternative option of using tax periods outlined above) as an alternative to using the existing 12 month method. This should avoid the need for any reconciliation to be performed.

- **Contribution payment deadlines**

  The automatic enrolment legislation currently allows employers to retain initial member contributions that they have deducted from pay, rather than paying them straight to the scheme, for longer than otherwise permitted by legislation in relation to pension contributions. They may retain them until the last day of the second month after the month which includes the jobholder's enrolment date.

  This only applies, however, in respect of jobholders enrolled in an automatic enrolment scheme in accordance with a requirement of the Pensions Act 2008. It does not therefore apply in respect of "entitled workers" who are enrolled despite there being no obligation to do so, nor to any workers who are "contractually enrolled". Some employers have therefore had to set up different systems for paying and refunding contributions in respect of different categories of worker. The Government proposes to widen the scope of the extended deadline described above so that it will apply in respect of any new joiner, irrespective of his or her enrolment circumstances.

  Payment of employer contributions will remain governed by the scheme's schedule of contributions or payments schedule.

- **Individuals who have opted out before automatic enrolment**

  It is proposed that jobholders need not be enrolled if they ceased active membership of a qualifying scheme by their own act or omission in the 12 months before the automatic enrolment duty would otherwise have applied in respect of them.

- **Opt-out notices**

  The regulations are expected to be clarified so that opt-out notices need only be in substantially the same form (rather than exactly the same form) as the pro forma notice in the regulations. Any such forms already accepted will be retrospectively validated.

- **The automatic enrolment joining window**

  The one month automatic enrolment window may be extended to six weeks. This is designed to avoid problems caused by the time it can take to categorise workers with fluctuating earnings, including those on zero hours contracts.

There are also proposed amendments to correct unintended drafting as regards the minimum requirements for cash balance schemes and the latest age from which pensions must be payable under the DB test scheme standard.

The Pensions Bill also includes provisions:

Pensions Bill (see Part 4):
https://www.gov.uk/government/organisations/department-for-work-pensions/series/pensions-bill

- giving the Government power to make regulations to **exclude specific groups of individuals** from automatic enrolment. This might (depending on the outcome of a future consultation on draft regulations) include:
  - individuals who have registered for enhanced or fixed protection;
  - DC active members who have given notice of retirement; and
  - individuals who hand in their notice while their enrolment is being deferred (ie, for up to three months for DC schemes and until 2017 at the latest for DB schemes);
- affecting **hybrid schemes** (ie, schemes that provide both DC and DB benefits), closing a loophole by ensuring that a hybrid scheme that offers a member only DC benefits for future accrual cannot take advantage of the right to defer automatic enrolment until 2017 that applies to DB and hybrid schemes (see **WHiP Issue 37**); and
- disapplying the **automatic re-enrolment** requirement where it would apply to a jobholder while his or her automatic enrolment has been deferred.

The Government also asked for views on the possibilities of:

- exempting employers from the automatic enrolment requirement if they are certified (or if they certify themselves) as contractually enrolling all their workers, regardless of category, into a qualifying scheme; and

- introducing simpler DB scheme quality tests when contracting-out ends in April 2016.

Single-tier state pension

The Pensions Bill includes the framework provisions to bring about the proposed state pension reforms and the abolition of contracting-out from April 2016. Please see our briefing note **State pension reform and the end of contracting-out** for background on the proposed changes (but note that this was issued before the reforms were brought forward a year, to April 2016).

The Government has published a new version of its *"Note on the cohort of women born between 6 April 1952 and 5 July 1953"*, reflecting the bringing forward of implementation of the single-tier state pension from 2017 to 2016. Due to unequal state pension ages, women born between these dates will receive old-style state pensions while men of the same age will receive the new single-tier state pension.

Pensions Bill (see Part 1):
https://www.gov.uk/government/organisations/department-for-work-pensions/series/pensions-bill

Note:
https://www.gov.uk/government/publications/the-single-tier-pension-note-on-the-cohort-of-women-born-between-6-april-1951-and-5-april-1953

GMP equalisation

The Government has issued an interim response to its January 2012 consultation on draft regulations relating to GMPs and sex discrimination (see **WHiP Issue 32**). This confirms that the Government still intends to make the regulations to remove the need for a member to identify a comparator when claiming unlawful GMP-related sex discrimination. They will also remove any argument that eliminating such inequalities is not required by UK law.

The Government will not, however, lay the regulations until it has explored with the pensions industry possible solutions to GMP equalisation issues involving the conversion of benefits that include GMPs into benefits that do not, under the existing facility in the Pensions Act 2007. The widely criticised draft guidance on a possible equalisation method will not be published in final form.

Please see our briefing note **Equalisation of benefits that include GMPs** for detailed background.

Interim response:
http://www.dwp.gov.uk/docs/draft-ops-and-pfea-regs-2012-interim-response.pdf

Finance Bill

The Finance Bill, which will become the Finance Act 2013, has been published. This includes provisions that were previously published in draft form (see **WHiP Issue 37**) on the following pensions measures (see Part 1, Chapter 4 and Schedule 21). Except where otherwise stated, the changes will take effect from 6 April 2014.

- The reduction of the annual allowance from £50,000 to £40,000.
- The reduction of the lifetime allowance from £1.5 million to £1.25 million. (If a member dies before 6 April 2014 but death benefits are not paid until on or after that date, the lifetime allowance at the time of the member's death (ie, £1.5 million) will apply.)
- The introduction of "fixed protection 2014" in relation to the reduced lifetime allowance. (The proposed new individual protection regime is not covered: this will be included in the 2014 Finance Bill following a consultation expected soon.)
- Amendments to correct defects in the existing fixed protection legislation.
- Amendments to the Finance Act 2004 to allow the ending of bridging pensions at any time between age 60 and the member's state pension age without making an unauthorised payment. (Currently, a bridging pension related reduction after age 65 causes an unauthorised payment.)
- Increasing the income drawdown limit for registered pension schemes to 120% of the value of an equivalent annuity for drawdown years beginning on or after 26 March 2013.
- Removing unintended tax advantages from employer contributions to the pension arrangements of an employee's spouse or family member.
- Tightening of restrictions on overseas transfers.

Finance Bill:
http://services.parliament.uk/bills/2013-14/finance.html

Takeover code

The Takeover Panel has finalised amendments to the Takeover Code upon which it consulted in summer 2012 (see **WHiP Issue 35**). These are designed to bring pension issues into the open at an early stage of a public company takeover. There are some

Announcement:
http://www.thetakeoverpanel.org.uk/wp-content/uploads/2013/01/2013-5.pdf

changes from the original proposals. In particular, DC schemes and unfunded schemes are no longer in scope. But funded DB schemes are covered, in the UK and overseas.

The amendments, which took effect from 20 May 2013, are as follows.

- The bidder and target will have to provide or make readily available certain documents to the target's pension scheme trustees, in much the same way as already applies for the target's employees and their representatives.
- Offer documents should state the bidder's intentions regarding employer contributions, benefit accrual and admission of new members, in all cases over at least the following 12 months. Neither the bidder nor the target will be required to state its assessment of the impact on the employer covenant or other possible repercussions of the takeover for the scheme.
- Trustees will be entitled (but not required) to express an opinion on the effect of the offer on their scheme and have this circulated by the target company board with its circular or (if too late) published on a website.
- Where the bidder enters into a funding agreement with the trustees, it will need to publish it if it is a "material contract".

Abolition of the FSA

The Financial Services Authority (FSA) was abolished on 1 April 2013 and replaced by two new bodies, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA). The FCA is a statutory corporation (the FSA with a new name); the PRA is part of the Bank of England.

All firms formerly regulated by the FSA are now regulated by the FCA. Some (banks, building societies, insurers and certain large investment firms) are also now prudentially regulated by the PRA. FSA permissions, modifications and waivers are grandfathered, as are approved persons' registrations. Registration numbers and approved persons' reference numbers remain the same. The Rulebook remains largely the same.

FCA website:
http://www.fca.org.uk/

PRA website:
http://www.bankofengland.co.uk/pra/Pages/default.aspx

Work and pensions select committee report

The Work and Pensions Select Committee has reported on *"Improving governance and best practice in workplace pensions"*. Its headline recommendations are as follows.

- There should be a single regulator of workplace pensions. Gaps between TPR and the FSA have been exacerbated by the replacement of the FSA with two bodies, the FCA and the PRA (see above). HM Treasury has reportedly rejected this proposal.
- Deferred member charges (sometimes euphemistically called "active member discounts") and member-borne consultancy charges (ie, set-up costs passed on to members) have the potential to cause serious consumer detriment and should be banned swiftly if the industry does not take quick action now to end them. (See "Pensions Bill" above.)
- Pension providers should be required to supply their customers with a comprehensive breakdown of all the annuity rates available to them from different providers.
- The Government, regulators and the pensions industry should work together to agree a communications format that sets out clearly the basic, essential information that schemes should provide to members.
- The Government and the regulators should investigate ways of assisting all employers who offer contract-based schemes to set up scheme governance committees.
- If "pot follows member" is implemented (see above), the Government must ensure that schemes are well governed and free from high charges.
- The Government should remove legislative and regulatory barriers to defined ambition schemes before contracting-out ends in April 2016.

Report:
http://www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/inquiries/parliament-2010/governance-and-best-practice-in-workplace-pensions/

PPF Ombudsman levy decision: foreign employers

The Deputy PPF Ombudsman has directed the PPF Board to review and recalculate the 2010/11 risk-based element of a scheme's pension protection levy following confusion over the collection of financial information about overseas companies.

The scheme had a Luxembourg-registered employer. It had submitted accounts to the Luxembourg companies registry but not to Dun & Bradstreet Luxembourg. Unlike D&B UK, D&B Luxembourg does not check publicly filed company accounts, so the employer's

Determination:
http://www.ppfo.org.uk/Decisions/docs/West-of-England-Ship-Owners-Insurance-Services-Limited-Retirement-Benefits-Scheme.pdf

failure score was calculated based on 2007 accounts and was much worse than it would otherwise have been. The trustees complained that they were not to know that D&B operated differently in Luxembourg in requiring financial information to be submitted directly to it.

D&B had rejected the trustees' appeal and said that the onus was on the trustees to ensure that D&B had the most up to date information.

The PPF's Reconsideration Committee had rejected the trustees' complaint on the basis that it has no power to require D&B to reassess a failure score and cannot lawfully recalculate it itself because this is not a reviewable matter under the Pensions Act 2004.

The Deputy Ombudsman found in favour of the trustees and directed the PPF to reconsider the matter. She said that the PPF Board could review the amount of the levy and correct relevant data. D&B Luxembourg's failure score was incorrect in a material respect – it was based on out of date financial statements that were irrelevant to the 2010/2011 levy year – and so was not *"correct and legitimate in itself"*.

The PPF is reportedly appealing the decision to the High Court.

Ill health pension: other suitable work

Determination:
http://www.pensions-ombudsman.org.uk/determinations/docs/2013/mar/po-421.doc

In the case of *Mr W Brown*, the Pensions Ombudsman considered what type of other work would be suitable for a train driver who claimed an ill health pension on the grounds that he was no longer able to do his job due to a foot disability.

The Railways Pension Scheme incapacity pension rule requires that the member is permanently unable to carry out his duties *"or any other duties which in the opinion of the trustee are suitable for him"*.

A human resources consultant considered medical evidence and opined that Mr Brown would be able to work on a customer services desk, at a supermarket checkout, in a call centre, or doing computer work. The trustee therefore decided that he did not qualify for an incapacity pension. Mr Brown disagreed that these roles were suitable for him, given his lack of academic qualifications, his previous work experience, his commuting difficulties, and the pay differential.

The Ombudsman determined that a suitable alternative role must be a job with duties that the member would be *"a good fit for"*. Referring to an earlier determination (*Mr A Garthley, 26092/2, 17 April 2009)*, he quoted with approval the previous Deputy Ombudsman as follows:

"In considering suitability, it does seem to me that it may be necessary to take into account a number of factors. It is not for me to prescribe those other factors. They would include of course mental and physical ability, but might also include things such as the previous earning capability, status, and possibly compatibility with previous career experience. I would not go so far as to say that it would be unreasonable to expect a dramatic change of career path, perhaps with appropriate retraining, but it would in my view be quite wrong to ignore completely what a person had been doing, perhaps for many years."

He added that such duties need not be within the same industry and that comparative income is relevant to suitability but is only one factor.

He determined that that the trustee had not established or explained to Mr Brown in sufficient detail how he was suitable for the jobs mentioned, taking into account his health problems and lack of academic qualifications and experience. The trustee was therefore directed to take its decision afresh and to give reasons when communicating its decision to Mr Brown.

The case turned on the wording of the relevant ill health retirement rule and the meaning of the phrase *"duties ... suitable for him"*. It reinforces the importance of carefully considering the meaning of the words used in ill health retirement rules.

Solvency II / IORP review

EIOPA report:
https://eiopa.europa.eu/fileadmin/tx_dam/files/consultations/QIS/OPC/qis1/Outcome/EIOPA-BoS-13-021_QIS_on_IORPs_Preliminary_Results_for_EC_-_20130409.pdf

DWP press release:
http://www.dwp.gov.uk/newsroom/press-releases/2013/apr-2013/dwp049-13.shtml

EIOPA has published preliminary results from its quantitative impact study (see **WHiP Issue 36**) on the proposal to impose "holistic balance sheet" funding requirements on IORPs (which include occupational pension schemes in the UK). The final report is expected by the end of June 2013.

The Pensions Minister, Steve Webb, has quoted EIOPA's estimate of an additional £450 billion cost in respect of UK defined benefit pension schemes, if Solvency II capital requirements were to be applied, and again urged the European Commission to *"abandon these reckless plans"*.

Accounting for pensions

New UK accounting standard

The FRC has published its new accounting standard, FRS 102. This will replace almost all existing UK GAAP standards, including FRS17. The most obvious impact is on employers' accounts but pension scheme accounts are also affected and the SORP will need to be updated.

FRS 102 will come into force on 1 January 2015 but early application is permitted for accounting periods ending on or after 31 December 2012.

Press release:
http://www.frc.org.uk/News-and-Events/FRC-Press/Press/2013/March/FRC-issues-FRS-102.aspx

IAS 19: proposed amendments

The IASB has published an exposure draft of proposed amendments to IAS 19.

> *"The IASB is responding to concerns that were raised about the complexity of applying certain requirements of IAS 19. Specifically the concerns related to the accounting for contributions from employees and third parties to defined benefit plans. The objective of the proposed amendments is to provide a more straight-forward alternative for this accounting when the contributions payable in a particular period are linked solely to the employee's service rendered in that period. The proposed guidance would be applicable, for example, to accounting for employee contributions that are calculated according to a fixed percentage of salary."*

Announcement:
http://www.ifrs.org/Alerts/ProjectUpdate/Pages/IASB-publishes-proposals-for-amendments-to-IAS-19-Defined-Benefit-Plans-Employee-Contributions-March-2013-.aspx

Case on the so-called rule in Hastings-Bass

The Supreme Court has partly dismissed and partly upheld the appeals in the cases of *Futter v Futter* and *Pitt v Holt* (see **WHiP Issue 26**) on the so-called "rule in *Hastings-Bass*" and rescission of a voluntary disposition on grounds of mistake. In these cases, trustees sought to reverse decisions which had adverse tax consequences that had not been identified by their advisers. HMRC argued that the transactions, and therefore their tax consequences, should stand. The Court of Appeal had ruled in HMRC's favour in both cases and the trustees appealed to the Supreme Court.

Judgment:
http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0089_Judgment.pdf

In *Futter v Futter*, trustees had advanced trust monies to beneficiaries in a manner that gave rise to a capital gains tax charge that could have been avoided had they not received incorrect tax advice. In *Pitt v Holt*, a mental health receiver (which is a fiduciary role akin to that of a trustee) made a voluntary payment to a trust with adverse inheritance tax consequences that could easily have been avoided had the appointed tax adviser not failed to consider the inheritance tax position.

Press summary:
http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0089_PressSummary.pdf

The so-called "rule in *Hastings-Bass*" concerns the circumstances in which the Court can declare void the exercise of a trustee discretion involving the payment of trust funds to or for the benefit of a beneficiary where the consequences are different from those intended by the trustees.

Lord Walker delivered the Supreme Court's unanimous judgment. He agreed with the Court of Appeal that *Hastings-Bass* cases must be split into two categories:

- Those where trustees act outside the scope of their powers, in which case the payment is automatically void.
- Those where the trustees have acted within the scope of their powers but in breach of a fiduciary duty, in which case the payment is voidable (at the Court's discretion on the application of a beneficiary of the trust). Otherwise, it stands.

In both the present cases, the trustees had acted properly and sought tax advice. That advice had been wrong or incomplete. Their resulting decisions were not void, because the making of the transactions was within their powers; and they were not voidable, because there had been no breach of a fiduciary duty. The transactions and their adverse tax consequences could not, therefore, be unwound on *Hastings-Bass* grounds.

It would seem, therefore, that the Supreme Court's decision has limited the scope for pension scheme trustees, using the rule in *Hastings-Bass*, to unwind decisions that they make and then regret, or which are made on the basis of incorrect advice.

In *Pitt v Holt*, the Supreme Court also considered rescission of the receiver's disposition on grounds of mistake. Lord Walker said that rescission on grounds of mistake will depend upon close examination of the facts of the case and evaluation of where justice lies. The mistake must be causative and of sufficient gravity. Consequences are relevant to the gravity of the mistake. Here, the tax consequences of the mistake were sufficiently grave and the trust could easily have been set up without the adverse tax consequences: indeed Parliament had intended to allow relief from tax for this type of trust. The conditions were therefore met for rescission of the disposition in *Pitt v Holt* on grounds of mistake.

OTC derivatives: Dodd-Frank

On 1 May 2013, a number of provisions of the derivatives regulations under the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act came into effect, having a direct impact on parties to OTC derivatives trades. (These are "over the counter" derivatives trades, ie, the derivatives that are not bought via a recognised exchange. Most derivatives trades entered into by UK occupational pension scheme trustees are "OTC".)

These regulations, which are similar to those introduced under EMIR in the EU (see **WHiP Issue 38**) and which are subject to a phased introduction over time, will (among other things) require swaps to be reported to central swap data repositories, certain standardised swaps to be cleared through central clearing-houses, and certain uncleared swaps to be subject to specific margining requirements.

For the time being, the scope of these regulations extends to swap activities outside the US that have a "*direct and significant connection with activities in, or effect on, commerce of the United States*". In implementing this test, the relevant US regulatory authority – the CFTC – requires compliance with the regulations in instances where either party to a swap, or the guarantor/credit support provider for a party, is a "US person". The term "US person" is defined broadly and includes, among others: legal entities organised under US laws or that have their principal place of business in the US; overseas branches of US-based entities; foreign subsidiaries and affiliates of US-based entities where the relevant swap trades are booked in the US; and entities that are otherwise subject to CFTC oversight. Large financial institutions and other major swap participants (as defined in the regulations) are subject to more onerous obligations than other market participants.

Trustees of UK occupational pension schemes and their investment managers entering into new trades or modifying existing trades with swap counterparties who are subject to these regulations may be required to update their swap documentation and procedures to enable their counterparties to comply with the regulations. Consequently, they should expect to receive requests from their counterparties and investment managers to certify whether they are subject to the regulations, to apply for a formal identification number from a registered central swap data repository and to disapply and/or amend a number of provisions of their existing swap agreements - which may be achieved by adhering to an ISDA Protocol that has been designed for this purpose. In order to adhere to the ISDA Protocol, a party (or its investment manager on its behalf) is required to determine and certify its applicable status under Dodd-Frank, requiring an understanding of the different classifications of market participants under the relevant US laws and regulations.

We are working alongside specialist US counsel to provide advice on the impact of the regulations and to help guide clients through the certification and adherence processes that may be mandated by their counterparties and investment managers.

Adequate pension protection

In *Hogan v Ireland*, the European Court was asked to rule on the protection (or lack of it) for the pensions of former Waterford Crystal employees in Ireland, when the company went into receivership and its two DB pension schemes wound up in deficit. It found that there was not adequate protection and the affected employees must be compensated by the Irish government.

Case report:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0398:EN:HTML

Ireland has no equivalent of the Pension Protection Fund (or of the statutory debts imposed on employers of UK schemes under section 75 of the Pensions Act 1995). Former employees sued the Irish government for not properly implementing Article 8 of the 2008 EU directive on the protection of employees in the event of the insolvency of their employer.

The European Court found that Ireland was in serious breach of its obligations and is therefore liable to compensate the former Waterford employees. The Irish High Court must now decide what compensation is due.

Public Service Pensions Act 2013

The Act:
http://www.legislation.gov.uk/ukpga/2013/25/contents/enacted

The Public Service Pensions Bill received Royal Assent on 25 April 2013. It will put in place the previously announced reforms to public service pension arrangements, including the new career average basis for DB accrual, pension ages linked to state pension age, and an employer cost cap.

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If you wish to discuss any points arising from this note, please speak to your usual contact in the Travers Smith Pensions team or to one of the Pensions partners: Paul Stannard, Peter Esam, Philip Stear, Susie Daykin and Daniel Gerring.

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