

## Pensions law – the week in review

10 August 2009

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## 1 ACTUARIAL PROFESSION

### 1.1 Survey regarding future provision of mortality and other demographic analysis

The Actuarial Profession is undertaking a review of the Continuous Mortality Investigation (CMI) and its role in helping the needs of the Profession's members and clients regarding mortality, morbidity and other demographic analysis.

The Profession considers the quantification of mortality and morbidity rates to be a core skill. In recent decades, the responsibility to develop mortality and other demographic tables has been delegated by the Profession to the CMI - an independent body set up to provide high quality objective analysis. The creation of the CMI also served to draw a distinction between the Profession itself and the preparation of the tables which it sponsors. It was intended that this approach would enhance the independence of such tables and ensure the confidentiality of the data submitted. However, until now, there has been no test of whether this distinction works in practice. The Profession is therefore consulting widely on the CMI's role and, as part of this project, is conducting an on-line survey.

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The survey can be accessed via the link to the press release below:

[http://www.actuaries.org.uk/media\\_centre/news\\_stories/2009/august/mortality\\_analysis](http://www.actuaries.org.uk/media_centre/news_stories/2009/august/mortality_analysis)

## **2 DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS (BIS)**

### **2.1 Companies Act 2006 - Draft guidance on constitutional documents**

The Companies Act 2006 has been coming into force in waves since receiving Royal Assent in November 2006. It is due to be fully in force by 1 October 2009.

From that date, new Model Articles will replace Table A for new companies (and any existing companies which choose to adopt them). BIS has published draft non-statutory guidance on the changes to constitutional documents of companies including the model articles of association.

The guidance sets out the differences between the model articles under the Companies Act 1985 (Table A) and the new model articles prescribed under the Companies Act 2006. It also includes information on changes to other constitutional documents and guidance for existing and new companies on suggested procedures to follow as a result of these changes.

To access the BIS guidance, please click on the link below:

<http://www.berr.gov.uk/files/file52470.pdf>

Sackers will be producing a Newsletter on the Companies Act 2006, summarising the final key features of the Act coming into force in October which are relevant to the corporate trustees of occupational pension schemes.

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### 3 CASES

#### 3.1 Walker Morris Trustees Ltd v Masterson and Lodge (High Court)

The scheme at the centre of this case had been altered on a number of occasions. However, as the validity of the changes made was questionable, the terms of the scheme's benefits were a matter of considerable uncertainty. The scheme could not be wound-up or transferred into the Pension Protection Fund until the status of the changes was determined. The scheme's independent trustee therefore applied to the court for guidance.

#### *Background*

The two participating employers in the scheme went into receivership in October 2004. Walker Morris Trustees Ltd was appointed as statutory independent trustee by the Receivers in November 2004 and is responsible for the scheme's winding-up.

Under the scheme's amendment power, the trustees, with the consent of the employer, could amend the trust deed and rules subject to certain provisos. Broadly, an alteration could only be made if, in the written opinion of the actuary (or other advisers), the members' rights and interests would not be prejudiced. This power was subject to an exception where changes were needed to secure Inland Revenue approval (or to maintain that approval).

Although a number of rule amendments had purportedly been made since 1981, there was no evidence that actuarial advice had been obtained in respect of any of the amending deeds. The key question for the court therefore was whether, in the absence of actuarial advice, any of the changes were valid.

It was argued that a literal reading of the power of amendment would produce a perverse result, i.e. potentially all the deeds would be rendered invalid. Additional arguments were made for the validity of certain of the deeds, including that certificates under section 67 of the Pensions Act 1995 enabled the actuarial advice requirement to be met in respect of two of them. One deed also sought to remove the scheme's statutory surplus. As this action was in line with Revenue requirements at the time, this potentially

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brought it within the exception to the amendment power's proviso, (namely, because it was needed to maintain Revenue approval).

### *Decision*

Mr Justice Smith was not convinced by the general argument in favour of the deeds, although he accepted that “the consequences were unfortunate”. In his view, “it [was] impossible to stretch or alter or re-construct [the amendment power] to allow these amendments to escape the consequences of the failure to obtain the clearly required Actuarial advice”. The majority of the purported alterations were therefore rendered invalid.

The judge was not persuaded that having a section 67 certificate obviated the need to obtain written actuarial advice. In his opinion, section 67 certificates are designed for a different purpose and, in providing them, the actuary was not carrying out the same exercise as that required by the power of amendment. These deeds were also therefore ineffective.

In addition the judge also rejected an argument that some of the amendments were valid as augmentations, as going “beyond the bounds of sustainability”, as only those who were members of the scheme at the time could benefit from the changes.

Ultimately only one deed was saved - the deed which dealt with the statutory surplus. The judge was satisfied that the exercise was carried out so that the scheme could maintain its Revenue approval, despite the fact that the amendments eliminated the entire surplus and “actually put the Scheme into deficit” (therefore exceeding the Revenue requirements). Alternatively, the trustees had in any event complied with the power under the scheme documentation to deal with surplus.

*Comment*

At first sight, this case appeared to be one concerning construction. However, in reality it serves as a useful reminder of the importance of considering a scheme's amendment power before making any changes, to ensure that all the requirements are met.

Given the failure of the trustees to follow the requirements of the amendment power, it was impossible for the court to reach any other decision. As the judge noted, "It is important to provide for pension funds which last for many years to be flexible and practical. However, this flexibility does not entitle one to construe provisions in a strained way to save a decision of the trustees".