

# THE QUARTERLY

MARCH 2008

## Introduction

Welcome to our Sackers Extra "Quarterly", designed to highlight significant developments in pensions law over the last quarter. The Quarterly is published in March, June, September and December. Each edition covers key areas such as pensions reform, regulatory developments, new legislation and cases.

Copies of our Sackers Extra publications referred to in this "Quarterly" are available from the client area of our website [www.sackers.com](http://www.sackers.com) or from your usual contact.

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## PENSIONS REFORM

### Pensions Bill 2007/08

#### ***New Pensions Bill published***

The new Pensions Bill was introduced into Parliament on 5 December 2007.<sup>1</sup> Amongst other things, it covers:

- details of the new personal accounts system and how it interrelates with occupational pensions;
- the Government's response to the Deregulatory Review (published on 22 October 2007) including provision for pension sharing changes and a reduction in the cap on revaluing deferred pensions; and
- the strengthening of the Pension Regulator's powers of intervention in relation to the funding of defined benefit schemes.

The Pensions Regulator will monitor the new system of personal accounts from 2012.

***New system of personal accounts unveiled***

### Financial Assistance Scheme (FAS)

#### ***FAS Update***

Regulations came into force in December 2007 which extend eligibility to assistance from FAS (the other pensions lifeboat). However, these are already out of date, given the joint announcement from the Government and the Young Review in mid-December.

As a result of that announcement, FAS will be extended further so that those eligible for help will now receive 90% of their promised benefits (subject to a cap). Also, around 11,000 people in schemes wound up with qualifying solvent employers will become eligible.

Further details of the scheme (including who is now eligible for FAS and the benefits which will be payable from it) can be found in our Alert – "FAS is for life, not just for Christmas" dated 18 December 2007.

But the latest chapter in the FAS story is an open letter sent to MPs at the beginning of February 2008 in which Mike O'Brien (Minister for Pensions Reform) said that he will be tabling amendments to the Pensions Bill. The aim is to have final FAS Regulations in force in time to ensure that all cases are dealt with by the end of August 2008.

***Changes announced to FAS need legislative force***

### Employer Debt Update

#### ***Employer Debt Amendment Regulations***

Although the consultation on the draft Regulations which will amend the Occupational Pension Schemes (Employer Debt) Regulations 2005 ended on 1 October 2007, the final Regulations have been delayed.

The latest from the DWP is confirmation that the Regulations are "95% likely" to have a 6 April 2008 implementation date.

***Employer Debt Amendment Regulations delayed further***

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<sup>1</sup> For further information, see our Sackers Extra Alert "Another Year, Another Pensions Bill" dated 7 December 2007

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## REGULATORY

### HM Revenue & Customs (HMRC)

#### ***Trustees and the new Anti-Money Laundering Regime***

Changes made to the UK anti-money laundering regime from 15 December 2007 require trustees or directors of a corporate trustee who are providing their services “by way of business” to comply with certain anti-money laundering requirements.

There are tough penalties for failure to comply with the new requirements. For instance, a civil penalty could be imposed on a trustee (or director) who fails to put in place adequate anti-money laundering systems or who fails to report a suspicious transaction.<sup>2</sup>

Our Sackers Extra Alert – “Trustees and the new anti-money laundering regime” dated 7 February 2008 – looks at this complicated area in more detail.

*Some trustees will need to register with HMRC under the new anti-money laundering regime*

#### ***Tax Simplification: Lifetime Allowance test – BCE3***

Following consultation announced in the 2006 Pre-Budget Report, legislation will be introduced to make three small changes to the rules on how the Lifetime Allowance (LTA) operates for pension increases (in particular, how Benefit Crystallisation Event 3 (or BCE3) is applied).

It is intended that these measures will have retrospective effect to 6 April 2006 (A Day).<sup>3</sup>

### National Association of Pension Funds (NAPF)

#### ***Updated corporate governance policy and voting guidelines***

In November 2007, the NAPF launched its updated Corporate Governance Policy and Voting Guidelines. These now include guidance on environmental, social and governance issues, as well as guidance on markets outside the UK.

*Corporate Governance – new guidance*

#### ***2007 Survey of UK pension schemes***

The latest NAPF Annual Survey of UK pension schemes (published on 4 January 2008) reveals that workplace pension provision is finding a new equilibrium after many years of change.

*2007 NAPF survey*

Around a third of private sector defined benefit schemes remain open to new members, and around two thirds of those are expected to remain open over the next five years without any change to the way in which existing members accrue benefits. Only 1% of open private sector defined benefit schemes are expected to close to current employees in the same period.

### Pension Protection Fund (PPF)

#### ***Risk-based levy deadlines***

The deadlines are fast approaching for employers and trustees to ensure that their scheme pays the lowest risk-based pension protection levy possible for the levy year 2008/09. Documents should be submitted by the following dates:

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<sup>2</sup> Ultimately, failure to comply with the anti-money laundering obligations may amount to a criminal offence

<sup>3</sup> For more information, see our Sackers Extra 7 Days dated 18 February 2008

- The Pensions Regulator's annual scheme return (including for most schemes the section 179 PPF valuation) – **31 March 2008**.
- Contingent assets certificates (or re-certifications) – midnight on **31 March 2008**.
- "Actuarial certificates of deficit-reduction contributions" – midnight on **7 April 2008**.
- Block transfer certificates – midnight on **7 April 2008**.

*PPF deadlines fast approaching*

In addition, remember that the 2008 insolvency risk measurement date is 31 March. This means that all data should be submitted to Dun & Bradstreet by this date in order for it to be taken into account. The D&B Failure Score may be appealed up to 28 days after receipt of the levy invoice.

#### ***Pension Protection Levy 2008/09 Determination***

At the time of going to press, we are still waiting for the PPF to issue the 2008/09 Levy Determination. Each year the Determination sets out the final detail of the levy – including factors to be used and rates. The final version has to be available before schemes can finalise key levy documentation – such as contingent asset certificates.

However, we do know from its response to the August 2007 Pension Protection Levy Consultation, that the PPF estimates it needs to collect £675 million in pension protection levies in 2008/09 (a figure which is unchanged from 2007/08).

*The amount of the levy*

The PPF confirmed that this levy estimate will remain stable for the next three financial years unless there is significant change in the level of risk faced by the PPF, although it will be indexed against average earnings.

The PPF also announced that it has raised the funding level at which schemes pay no risk-based levy from 125 per cent to 140 per cent.

#### ***Guaranteed Minimum Pensions (GMPs)***

The board of the PPF has stated its position on the equalisation of GMPs, after having taken legal and actuarial advice.

The PPF's position is that:

- it is subject to a legal obligation to provide equal compensation to men and women in comparable employment situations; and
- the legal obligation extends to equalising compensation for men and women by virtue of their GMP entitlement.

The PPF has said that it is currently taking actuarial advice on how best to deal with this issue and that it intends to consult in due course.

*GMPs – the PPF says it needs to equalise*

### **The Pensions Regulator (TPR)**

#### ***TPR issues first Financial Support Direction (FSD)***

TPR confirmed that Sea Containers Limited (the Company) had withdrawn its appeal to the Pensions Regulator Tribunal against the Determinations Panel's decision (back in June 2007) to issue two FSDs to the Company.

*First FSD issued*

As a result of the withdrawal, the Determinations Panel issued the two FSDs on 6 February 2008 to the Company. As the parent company, the Company must now provide financial support for two pension schemes belonging to its London

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London-based UK subsidiary, Sea Containers Services Limited. The Company will be compelled to provide a form of financial support to the two schemes within 30 days of the FSDs being issued.<sup>4</sup>

### ***Scheme Returns - new system***

Since December 2007, TPR has been issuing scheme return notices to all registered occupational pension schemes by post, asking trustees to register to use their new online system called "Exchange".

***Scheme returns – must be completed electronically***

Defined benefit, hybrid and small defined contribution schemes were due to receive their returns between December 2007 and January 2008. Large defined contribution schemes should receive their scheme return from February 2008.

### ***Guidance on voluntary employer engagement in Group Personal Pensions (GPPs)***

TPR has published guidance on voluntary employer engagement in GPPs.

The guidance identifies:

***GPP – voluntary employer engagement***

- ways in which employers might choose to be involved in the governance of a scheme; and
- considers employer engagement options, including involving advisers, employer representatives, employees, management committees and trustees in reviewing the operation of the scheme.

### ***Personal Accounts Delivery Authority (PADA)***

#### ***Consultation launched on the charging structure for Personal Accounts***

PADA has launched its consultation "Building personal accounts: choosing a charging structure" which covers the proposed structure to be used for the scheme. Charging levels will depend on the final design of the scheme, its costs and the source of finance for the scheme, which will not be known for some time.

***Personal accounts – charging structure***

A number of options are being considered including an annual management charge (AMC), a contribution charge, a joining charge, and a combination of a contribution charge with an AMC.

### ***Miscellaneous***

#### ***James Purnell appointed Secretary of State for Work and Pensions***

In January 2008, James Purnell took over as the Secretary of State for Work and Pensions following Peter Hain's resignation.

***James Purnell  
new Secretary of State***

He will be joined in the Department by Stephen Timms as Minister of State for Employment and Welfare. Mike O'Brien remains Minister for Pensions Reform.

#### ***Accounting Standards Board (ASB)***

The ASB has issued a Discussion Paper, "The Financial Reporting of Pensions" ("the Discussion Paper"), which considers possible important changes to the way pension fund assets and liabilities are calculated and reported. Comments on the Discussion Paper are requested by 14 July 2008.

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<sup>4</sup> For further details, see our press release dated 6 February 2008

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After consideration of the responses, a report containing final recommendations will be issued.

Key proposals include:

- reporting changes in pension assets and liabilities in the period in which they arise (rather than being spread forward); and
- the reflection of the actual return on assets in financial statements (rather than the expected value as is currently required);

with the aim of better reflecting the underlying economic reality.

On the measurement of liabilities, the paper argues for the use of a risk-free discount rate (rather than the high-quality corporate bond rate required by current accounting standards).

The report also touches on financial reporting to members – recommending that “the relationship between the plan and employer should be transparently reported, including the effect of the employer’s covenant on the plan’s financial position”.

### **Local Government**

The Department for Communities and Local Government has issued an (informal) consultation on the arrangements for companies who wish to participate in the Local Government Pension Scheme (LGPS) by way of a procedure called Admitted Body Status (ABS). Participation by ABS is a way for a company to meet obligations to provide pensions to ex-public sector workers where they provide outsourced local authority services.

The consultation considers the operation and potential future arrangements for ABS. Sackers intend to respond to this consultation. If you have any comments you would like us to raise, please speak to your usual Sackers contact.

### **Risk management of alternative investments**

On 2 February 2008, the International Organisation of Pension Supervisors (an independent body representing those involved in the supervision of private pension provision), published a paper on good practices in the risk management of alternative investments by pension schemes. The paper sets out examples of good practice by national supervisory authorities. Alternative investments include hedge funds, private equity and securitised real estate investments.

While many recommendations are already reflected in UK legislation, the Pensions Regulator is likely to want to consider whether the remainder should be addressed in further guidance to schemes.

## **CASES**

### **European Court of Justice (ECJ)**

#### ***Lindorfer v Council of the European Union***

##### ***Background***

Ms Lindorfer, an Austrian national, was an employee of the Council of the European Union (the “Council”).

She requested a transfer of her national pension into the Council’s own scheme (the Community scheme). The Community scheme operated different actuarial factors for men and women when calculating transfer credits. Ms Lindorfer

*All change for company pension reporting?*

*The future of ABS*

*Alternative investments*

*Are sex-based actuarial factors an endangered species?*

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alleged that this was discriminatory on the grounds of sex and age.

#### *Decision*

The ECJ decided that the use by the Council of different actuarial factors for men and women when calculating transfer credits (which was inconsistent with the Community scheme's own rules) amounted to unlawful sex discrimination. However, the ECJ rejected Ms Lindorfer's claim that it also amounted to age discrimination.

But the ECJ did not properly address the 1993 decision in *Neath v Hugh Steeper Ltd*<sup>5</sup> which made it clear that the use of sex-based mortality or actuarial tables are permitted. In addition, UK legislation also allows the use of sex-based actuarial factors as an exception to the general non-discrimination rule.<sup>6</sup>

It therefore remains to be seen whether this case will be confined to its own facts.

## Court of Appeal

### ***Bradley and others v Secretary of State for Work and Pensions***

#### *Background*

The Parliamentary Ombudsman (the Ombudsman), Ann Abrahams, launched an enquiry in 2004 after receiving more than 200 complaints from members of pension schemes that had been wound up. Her report (published on 15 March 2006) (the Report) found that the DWP and its predecessor, the Department of Social Security (DSS), had been guilty of maladministration. This was one of a number of factors causing injustice to those who had lost all or part of their final salary occupational pensions on the winding-up of their schemes.

In a written statement to Parliament of 15 March 2006 (and a more detailed oral statement by the Secretary of State in the House of Commons on 16 March 2006), the Government rejected all but one of the Ombudsman's findings and recommendations.

In February 2007, the High Court overturned the Secretary of State's rejection of the Ombudsman's finding of maladministration (on the grounds that official information relating to the minimum funding requirement had been misleading).

#### *Decision*

The Court of Appeal has rejected an appeal by the Secretary of State for Work and Pensions against last year's High Court decision. The three judges said that the Government's maladministration had caused distress, anxiety, uncertainty and had denied workers whose occupational pension schemes were wound up, the right to make informed decisions.

The extension of FAS means that the victory in the Court of Appeal is of more moral, than financial, value to campaigners. But the case rumbles on as the Minister is seeking leave to appeal to the House of Lords against this decision.

*The campaign for compensation from the Government rumbles on*

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<sup>5</sup> [1994] 2 All ER 929

<sup>6</sup> For further details see our Sackers Extra News "Lindorfer – Are sex-based actuarial factors an endangered species?" dated February 2008



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## High Court

### ***Allied Domecq (Holdings) Limited v (1) Allied Domecq First Pension Trust Limited and (2) Allied Domecq Second Pension Trust Limited***

#### *Background*

This case was brought in connection with two multi-employer schemes (together referred to as the “Scheme”) sponsored by Allied Domecq (the Company). It deals with the interpretation of the Scheme’s contribution rules and related provisions, as well as the impact of scheme funding legislation on those rules.

The key question at issue concerned the Scheme rule which provides for the restoration of the solvency of the Scheme where a valuation reveals a deficit. The Court was also asked whether the Scheme’s contribution rate was determined by the actuary or, in some respects, on the advice of the actuary without employer consent.

#### *Decision*

The Court found that under the Scheme rules the trustees and the Company were required to apportion the collective contribution rates between the various participating employers. However, neither has any role in ascertaining the overall amount required to be paid, which is a decision for the scheme actuary with no power of veto by the employer.

Under the Pensions Act 2004, the default position is that the trustees must get the agreement of employers on a number of matters relating to scheme funding including the contribution rate. However, in recognition that this default would remove from certain schemes a provision likely to be beneficial to members (i.e. the unfettered right of the actuary under the Scheme to set the overall contribution rate) a proviso was built into the scheme funding regulations to preserve the balance of powers under the Scheme in a case such as this.

### ***Smithson v Hamilton***

#### *Background*

The early retirement terms under the scheme rules provided that:

- an active member could take early retirement after 60 but before Normal Retirement Age at 65 (NRA) without employer consent but the pension was subject to actuarial reduction; and
- a deferred member was entitled to take an immediate pension without consent but with no actuarial reduction.

Deferred members were therefore treated more favourably than active members as no reduction was applied to their pension on early retirement.

The company argued that there was a mistake in the drafting of the Definitive Deed and Rules and that a pension paid to a deferred member before NRA should be subject to actuarial reduction. However, the Company did not make a rectification claim – rather they made a claim under:

- the so-called rule in *Hastings-Bass* – an application for an order to set aside on the grounds that trustees would not have acted as they did if they had not failed to take into account considerations which they ought to have done, or taken into account considerations which they ought not to

**Statutory provisions vs.  
scheme rules**

**No rectification “by the back  
door”**



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have done; or

- the principle in *Gibbon v Mitchell* – an application to set aside a voluntary transaction because the person who carried out the transaction was mistaken as to its legal effect.

#### *Decision*

The claim was dismissed because neither application was appropriate to the circumstances of the case. It was not possible to alter the rule under *Hastings-Bass* nor was it a voluntary transaction of the type envisaged by *Gibbon v Mitchell*. The judge held that there should be “no rectification by the back door”.

We understand that this decision is being appealed.

**Case under appeal**

## **VAT Tribunal**

### ***Capital Cranfield Trustees Limited v HMRC***

The London VAT tribunal ruled in January 2008 that Capital Cranfield Trustees Limited, a professional trustee company acting in its capacity as a statutory independent trustee, is entitled to claim a VAT refund on expenses incurred in respect of the Kenrick and Jefferson Group Pension Plan following its successful appeal against HMRC.

Previously, trustees of pension schemes with a sponsor that has ceased trading were unable to claim VAT. Pension schemes with a solvent sponsor claim VAT back through its employer. As a result of the ruling, statutory independent trustees in similar circumstances (namely those who are VAT registered) can now claim up to three years of VAT refunds.<sup>7</sup>

**VAT refund allowed**

The case may yet be appealed.

## **Pensions Ombudsman**

### ***Mrs W***

This case concerned the distribution of a death in service lump sum. The Deputy Ombudsman criticised the trustee for failing to manage a conflict of interest and failure to keep any written record of how it reached its decision.

#### *Background*

Ms W's father (Mr W) was the sole member of the Adam Wilson and Sons Ltd Discretionary Pension Scheme (the “Scheme”). The Trustee was the principal company.

Mr W's nomination form gave 25 per cent each to Ms W (his daughter) and his 3 granddaughters (his son's daughters). When he took a lump sum on retirement, he gave the lump sum he received to his daughter and granddaughters following the distribution pattern from the nomination form.

On Mr W's death, the Trustee decided to distribute the remaining instalments of Mr W's pension to Mr W's son, a director of the principal company who chose to divide them between his daughters (the 3 granddaughters). No written record was kept as to what was taken into account when this decision was made.

**A conflict of interest**

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<sup>7</sup> For further details, see our press release dated 17 January 2008

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### *Determination*

The Deputy Ombudsman noted that Mr W's son was a director of the company and the father of the granddaughters, which meant that there was a clear conflict of interest for him. Mr W's only recorded wish in relation to the distribution of his death benefits was that Ms W was to receive an equal share but the trustee excluded her from the distribution.

The Deputy Ombudsman said that:

"In such circumstances it is particularly important that the decision making process is fully documented, and it is unfortunate therefore that there are no minutes of meetings or any other primary evidence to substantiate the Trustee's claim as to how it came to the decision it did. Without such a documentary record there is no way of verifying what factors were taken into consideration when the Trustee made its decision, or that the potential conflict of interest was properly dealt with."

This decision of the Ombudsman is the latest in a long line where trustees have been criticised for failing to give reasons for their decisions.

***Trustees should give reasons  
for decisions***

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Nothing stated in this document should be treated as an authoritative statement of the law on any particular aspect or in any specific case. Action should not be taken on the basis of this document alone. For specific advice on any particular aspect you should consult the usual Solicitor with whom you deal. © Sacker & Partners LLP February 2008

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