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Trustee risk management hot topic

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Making the most of Trustee protections

Trustees of all pension schemes have some form of protection, whether statutory or scheme specific, which provides comfort to them in carrying out their duties. With the changing pensions landscape, understanding these protections is more important than ever.

What protections might you have?

Exoneration provisions

- Many scheme rules will contain an exoneration provision, the effect of which is to exempt trustees from liability to scheme members or employers.
- The Pensions Ombudsman or a Court will limit the circumstances in which an exoneration provision may apply to only those clearly covered by the wording. There are very few reported decisions dealing with exoneration provisions in the pensions context.
- Importantly, exoneration provisions do not apply to the performance of an investment function by trustees.

Indemnity provisions

- Again, many scheme rules will contain an indemnity provision. An indemnity provides a potential source of funding for trustees to meet a liability they incur.
- This may be an indemnity out of the scheme assets or a direct indemnity from the sponsoring employer of the scheme.
- But like all indemnities, they are only as strong as the fund or employer that provides it.

Trustee insurance

- Some trustees have insurance cover which provides a potential source of funds to meet both successful claims and the costs incurred in dealing with claims (regardless of the outcome).
- The terms of the insurance cover can vary markedly (even if they look very similar) and trustees and employers alike should ensure they understand the extent of the cover provided by both their policy and others on the market.
- When considering whether to take out or renew insurance, trustees and employers should consider the terms being offered in conjunction with any exoneration and indemnity provisions that may also apply to them.

Making the most of Trustee protections cont.

Dealing with member complaints

From time to time, members may have valid grounds for complaint. With that in mind, it can be useful for trustees to discuss with their sponsoring employer the approach they might take to relying upon their protections should the situation arise. Each case should, however, also be considered on its merits and when it arises.

Where an indemnity provision can be relied upon to compensate a member's loss, some trustees may decide that it is too 'un-trustee-like' to use an exoneration provision to avoid liability for that loss. This was something we touched upon in the Pensions & Investment Litigation Briefing in April 2016.

While there is nothing legally wrong with relying on an exoneration provision in this way, it is recognised that this may not be a comfortable position for some trustees to adopt. However, trustees may be more comfortable doing so where the member's loss has been caused by a third party engaged by the trustees. In such a situation, reliance upon the exoneration would not deprive the member of compensation for his or her loss – it could be ordered directly against the third party. But the trustees would both avoid having to compensate the member directly (and then seek reimbursement from the third party) and minimise its costs of dealing with the member's complaint.

It is also worth considering the terms of any insurance when dealing with member complaints. This can provide cover for both costs and any compensation to the member.

DC schemes

Although members of DC schemes accept that they will not know the final value of their 'pension pot' until retirement, the trustees of those schemes still have important duties to their members.

When errors occur, those duties can lead to liability for any loss suffered by members. And in the DC context, when errors occur, they can affect many members and they can be difficult and costly to put right.

So it is even more important for trustees and employers to be familiar with the protections that are available and how they can be used in practice.

Distress situations

Trustee protections tend to be most valuable where the scheme and/or the employer are in weak financial circumstances. Some difficult issues also arise in relation to obtaining or renewing insurance when winding up a scheme or when it is in a PPF assessment period.

For trustees who may be facing these circumstances, plan ahead. Be clear about the risks and how to deal with a complaint or claim should one arise.

The future

We expect to see greater awareness of, and reliance on, trustee protections in the future.

Although it raises issues that can be uncomfortable and difficult, it is important for both trustees and employers to become familiar and engage with them.

For more information, please get in touch with a member of the Pensions & Investment Litigation team: Katherine Dandy, Peter Murphy, Arshad Khan, James Bingham and Alasdair Blackshaw.

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