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The Nugee Pensions Lectures

#1: Requests for Contribution Breaks

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and Francesca Mitchell

Contribution breaks from the Trustees’ Perspective

Simon Atkinson and Francesca Mitchell

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TPR Guidance for Trustees

1. DB scheme funding and investment

Employers' requests for easements

- Trustees should be open to requests to reduce or suspend deficit repair contributions
- Key principles to keep in mind
  - Understanding employer's cashflow and drivers for the request
  - Ensuring no payments made to related entities or shareholders
  - Creditors should generally be supportive
  - Any suspension should have an end date and triggers to restart if trading returns to normal
  - Short periods of suspension

TPR Guidance for Trustees

- If sufficient information is not available to make a fully informed decision, trustees should agree to requests for as limited a period as possible
  - no longer than 3 months if trustees are not able to fully assess employer's position
- Full and ongoing provision of information should be provided
- Concessions should be short term only
  - further extensions may be appropriate where other creditors commit to support for longer periods and restrictions by trustees would limit that support
- Trustees should ensure other creditors are being supportive and no dividends are being paid
  - extraordinary and essential intra-group payments/lending may be justifiable
- It is unlikely that release of security will be in the members' best interests

TPR Guidance for Trustees

- Take legal and actuarial advice
  - including whether the most appropriate method is to amend Schedule of Contributions or simply suspend payments without amendments to SOC in order to avoid unintended consequences, e.g. triggering a winding up
- Contributions should be repaid within the current recovery plan timeframe, and recovery plan should not be lengthened unless there is sufficiently reliable covenant visibility
- TPR cannot waive trustees' statutory obligations
  - TPR will not take regulatory action in respect of late reporting or failure to make contributions during the three months
- Requests to suspend / reduce future service contributions should be treated in the same manner
  - but there are additional issues to consider (e.g. is this permitted by the scheme rules?)

TPR Guidance for Trustees

2. DC scheme reducing contributions

Employer wants to reduce contributions

- TPR has published guidance for employers, particularly those who are struggling to make their pension contributions in relation to DC pensions
- If employers are paying more than 3% auto-enrolment statutory minimum contribution, then the excess is not funded by the Coronavirus Job Retention Scheme
- Depending on employment contracts and the terms governing the pension scheme this may require approval of employees / trade unions / trustees

TPR Guidance for Trustees

- If the employer wants to reduce their contribution:
  - They can only do so if they don't breach the auto-enrolment requirements, and
  - They will need to consider several factors first, including whether a change to the scheme rules will apply and whether consultation is necessary

- Employers with at least 50 employees are legally required to consult with members for a minimum of 60 days if they are making changes that decrease employer contributions
  - However, the TPR will ease regulatory action if the employer fails to consult for the full 60 days, subject to certain conditions –
    - the main condition being that the employer is only proposing to reduce contributions for furloughed staff, in alignment with the Government’s Job Retention Scheme

TPR Guidance for Trustees

- If a change to the scheme rules is required, it will depend on the individual scheme rules as to who has the power to do this
  - It could be the trustees, the employer, or be shared between them
- Trustees will need to make sure that the decision they take is in the best interests of the members
  - Trustees can consider the likelihood of the employer being able to continue as a going concern if they continue to pay the current rate of contributions
  - but Trustees should make sure they are satisfied that this is a genuine risk and give thought to whether any change should be temporary
- If the power rests solely with the employer, TPR recommends that employers notify the Trustees before making any changes

TPR Guidance for Trustees

<u>3. Reporting duties and enforcement activities</u>

- TPR's general approach to a number of administrative and governance requirements will be based on the following guiding principles:
    - <u>Reporting</u>: If the breach will be rectified within a short timeframe (not more than three months) and it does not have a negative impact on savers, there is no need to report to TPR – but Trustees should keep records of any decisions made and actions taken
    - <u>Enforcement</u>: In making decisions about whether to take regulatory action in respect of breaches of administrative and compliance requirements, TPR will do so on a case-by-case basis and adopt a flexible approach
        - – i.e. granting longer periods to comply and taking COVID-19 into account.

TPR Guidance for Trustees

- The Pensions Ombudsman has confirmed it will take into account the TPR guidance on COVID-19 issues if it receives any complaints about delays caused by COVID-19
- The TPR easements on reporting duties and enforcement activity are in place until 30 June 2020
  - TPR to review whether more flexibilities/restrictions are required, and whether the date should be extended

Issues for Trustees

Three principal issues

- Powers: what can / should you do?
- Persuasion: dealing with employers/members
- Penalties: what could possibly go wrong?

Powers

- Starting point: trust deed and rules
- Are contribution holidays/reductions expressly allowed?
- If not, can the TDR be amended? If so, how?
- Oops! (i.e. unintended consequences: wind-up, employer withdrawal)

Powers (cont.)

- Other issues to consider:
  - Fraud on a power / proper purpose
    - Re Merchant Navy Ratings Pension Fund [2015] EWHC 448 (Ch)
    - British Airways plc v Airways Pension Scheme Trustee Ltd [2018] EWCA Civ 1533
  - Revision of schedules of contributions: PA 04, s. 227
    - Actuarial input required?
  - Review/revision of recovery plan? PA 04, s. 226
    - TPR expects repayment of contributions within existing RP

Persuasion

- Dealing with the employer
  - TPR expects Trustees to be sympathetic to requests for contribution holidays/reductions
  - **<u>But</u>** TPR also expects employers to be frank in the information provided by employers
  - TPR also expects Trustees to be robust: breaks to be as short as possible; shortened if circumstances permit; etc.
  - Pension scheme is just one of several creditors of the employer. What are the others doing?
  - Always, always: what is in the best interests of the objects of the trust?

Persuasion (cont.)

- Dealing with the membership
  - Do the proposals relate to DRCs or future service contributions (or both)?
  - Is consultation required / advisable?
  - Will contribution reductions breach contracts of employment?
  - What happens in the nightmare scenario: contribution holiday / reductions agreed, employer then goes belly up? What are the members going to say / do? What losses might be claimed?
  - Legal advice and communication is key!

Penalties

- Any concern about civil penalties?
  - Pensions Act 1995, s. 40: certain employer related investments are prohibited (but unpaid employer contributions are exempt from scope of s. 40)
  - Finance Act 2004, s. 179: Unauthorised employer loans?
    - HMRC guidance: arm’s length commercial negotiations, including payment holidays on loans, will not trigger an unauthorised payment charge. No further guidance
  - Breach of reporting obligations: TPR is taking a flexible, case-by-case approach to enforcement

Contribution breaks from the Employer's Perspective

Tom Robinson

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1. Why approach the scheme at all?

a) It has an interest in seeing the employer survive

b) The business does not depend on its services

c) It takes a long term view

d) It may have been less affected by recent events (business interruption vs falls in asset values)

- Identifying the reasons helps shape strategy

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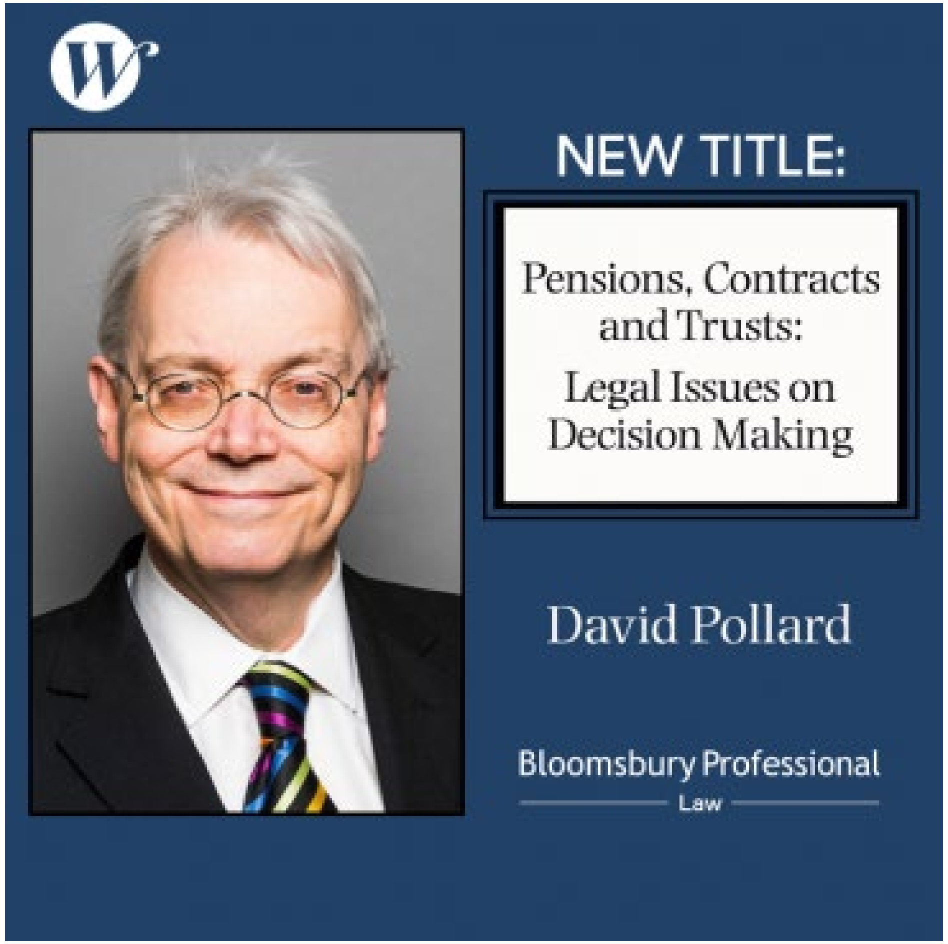
2. Issues for the employer to consider

a) Insolvency and associated legislation, including under the Corporate Insolvency and Governance Bill 2020

b) TPR and pensions legislation

c) Non-statutory considerations

Bedtime reading



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Non-statutory considerations

a) “equality is equity”;
b) Transparency;
c) Prudence.

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Non-statutory considerations

Cabinet Office "Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency", 7 May 2020, encourages:

"being reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with any disputes), acting in a spirit of cooperation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party (or parties), the availability of financial resources, the protection of public health and the national interest."

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Insolvency and associated legislation

1. Duty to have regard to creditors' interests when insolvency is probable

Section 172(3) Companies Act 2006

BTI 2014 LLC v Sequana SA [2019] EWCA Civ 112

Subjective test, assuming directors have regard to creditors' interests

Care with group companies

Insolvency and associated legislation

2. Wrongful trading

Sections 214 & 246ZB Insolvency Act 1986

Notifiable Events Regulations, Reg 2(2)(c)

Financial consequences temporarily suspended by Corporate Insolvency Bill

Insolvency and associated legislation

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3. New Moratorium

Corporate Insolvency and Governance Bill, cl 1, introducing new Part A1 to Insolvency Act 1986

20 business days (extendible up to 12 months). Must aim at rescue of employer. Moratorium on payment & enforcement of most debts, incl. DRCs

Not an insolvency event for s.121 PA 2004

Pensions legislation

a) Notifiable events?

b) Pension Schemes Bill

TPR Guidance for employers

TPR Guidance of 20 & 27 March 2020:

a) Contribution breaks may be appropriate
b) Provision of information to trustees
c) Fair treatment of scheme
d) We will be pragmatic

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Fair treatment of scheme

a) Differential treatment can be justified

b) Differential treatment may even be necessary to achieve fairness

c) Consider business continuity, perceptions, particular mitigation a scheme can be offered

Prudential Assurance Co Ltd v PRG Powerhouse Ltd [2007] BCC 500 at [83-91]

Mourant & Co Trustees Ltd v P Hollis & Ors [2010] EWHC 1890 (Ch) at [67(d)

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