ALLEN & OVERY

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Pensions: what's new this week

Welcome to your weekly update from the Allen & Overy Pensions team, bringing you up to speed on all the latest legal and regulatory developments in the world of occupational pensions.

Reminder: upcoming changes to investment duties | TPR ends Johnston Press anti-avoidance investigation | No breach of duty by directors: KeyMed | Update: fiduciary management, investment consultants | Changes to the Financial Services Register | Increase to FOS compensation limit

Reminder: upcoming changes to investment duties

Over the next 18 months, a number of changes to trustees' investment duties and obligations to disclose information to members will come into effect – namely, providing information in relation to pooled funds (from 1 April 2019) and disclosing information about scheme policies on stewardship and on environmental, social and governance issues in investment decision-making (from 1 October 2019 and 1 October 2020). Our new publication Pension scheme investing: Keeping members informed explains these changes, as well as the rules on publishing costs and charges information for DC schemes, which some schemes may not yet have addressed.

TPR ends Johnston Press anti-avoidance investigation

The Pensions Regulator (TPR) has ended its anti-avoidance investigation in connection with the sale of the Johnston Press Group under a pre-pack arrangement on 17 November 2018, according to a new report. Under the arrangement, the businesses and assets were sold to a company owned by the Group's bondholders.

TPR found no evidence that insolvency was avoidable or that the timing of the administration had been artificially engineered to avoid a deficit repair contribution of almost GBP900,000 due to be paid on 19 November 2018. It was satisfied that there were no acts prior to the administration that merited further investigation. However, there could be a further investigation if the administrator or the Pension Protection Fund uncover any new and relevant evidence.

The report also sets out TPR's general approach to pre-packs:

> 'Pre-pack insolvencies are a legitimate means of preserving jobs and value in a business which could otherwise end up in liquidation. However, where an insolvency occurs, stakeholders (including the pension scheme) may lose out. Where pre-pack insolvencies result in the removal of sponsor support from a defined benefit scheme, the parties to the transaction should expect us to investigate whether there are grounds for us to take

anti-avoidance action, particularly in circumstances where there is an association between the new owners and the previous owners or other stakeholders.'

No breach of duty by directors: KeyMed

The High Court has dismissed a claim by KeyMed Ltd that two of its former directors acted in breach of their duties in relation to company pension arrangements: *KeyMed Ltd v Hillman anor*.

KeyMed's claims related to:

- The establishment in 2007 of an Executive pension scheme of which the two directors were the only members. The directors were trustees of the staff scheme and also became the sole trustees of the Executive scheme.
- The non-application of the former Inland Revenue limit on increases to pensions in payment from the Executive scheme (schemes could choose to continue to apply these limits after A-day). This meant that the two members had a right to 5% increases on pensions in payment.
- An amendment to the survivor benefit provisions in the Executive scheme to the benefit of the directors (and particularly one of the directors who planned to marry a younger partner).
- The conservative funding and investment strategies adopted in relation to both schemes – this related to the additional contributions made to the schemes by KeyMed as well as the investment strategies adopted. KeyMed argued that the shift to more conservative investment strategies in 2009/2010 was a breach of duty to the company.

Essentially KeyMed argued that the individuals were in (dishonest) breach of their duties in their capacity as directors of KeyMed and also as trustees of the pension schemes, and that they conspired to maximise their own benefits. KeyMed's allegations included: the true purpose of establishing the Executive Scheme was to maximise the security and value of the two directors' own pension benefits, which was not in the interests of KeyMed and had been concealed from other directors; the individuals had not properly declared conflicts of interest; and that, as trustees, the individuals owed a duty to the employer. There was limited documentary evidence.

Mr Justice Smith rejected all of the claims. Key points of interest include:

- Smith J rejected the argument that, as trustees, a duty was owed to the employer – he considered that trustees may have regard to the employer's interests, but do not owe a fiduciary duty (in line with the earlier case of *MNRPF Trustees Ltd v Stena Line*).
- He concluded that the trustees of the schemes had the primary decision-making power in relation to investment and funding matters, and owed no duty to KeyMed in exercising these powers. Under the rules of the schemes, KeyMed could make additional contributions with the consent of the trustees – a number of additional contributions had been made to both schemes which were now criticised by KeyMed. Smith J considered that the funding and investment strategies were within the range of reasonable approaches that could have been adopted, and were endorsed by KeyMed – he also commented that the conservative funding approach was in the interests of both the members and KeyMed as it materially reduced the risk that it would have to make significant payments to the scheme(s) in future.
- The judgment includes some commentary on conflicts of interest (including the individuals' roles as KeyMed directors, as against their interests as members). KeyMed alleged that they acted in conflict of interest without properly declaring that interest, but the judge found that the conflict had been declared in relation to the Board decision to approve the proposal for the Executive scheme, and that later conflicts were managed and were known to the other directors, who gave their informed consent.

Update: fiduciary management, investment consultants

The Competition and Markets Authority (CMA) is currently consulting on an order implementing proposed remedies following its final report into the investment consultancy and fiduciary management sectors (for more details, see WNTW, 18 February 2019). The order would impose obligations on trustees to tender for fiduciary management services and to set objectives for investment consultants.

The government and TPR have now confirmed that the government plans to legislate for these new trustee obligations and will give TPR power to monitor compliance. It will consult on draft regulations later this year. TPR will also produce guidance for trustees – it will engage with stakeholders and the CMA before consulting on the guidance this summer.

Changes to the Financial Services Register

The FCA has announced changes to its public listings of regulated persons and entities – in future, only individuals with specified Senior Manager roles at regulated firms will appear on the Register. A new Directory listing other individuals is expected to be live from March 2020 (for banks and insurers) and December 2020 (all other firms). Trustees and administrators currently use the Register when processing transfer requests, in line with TPR's advice on pension scams and guidance on DB-DC transfers, as well as the industry Code on Combating Pension Scams. TPR is currently reviewing its DB-DC transfer guidance, and is expected to update its materials to take account of these changes.

Increase to FOS compensation limit

The FCA has announced that from 1 April, the current GBP150,000 award limit for the Financial Ombudsman Service will increase to GBP350,000 for complaints about actions on or after that date. For complaints about actions before 1 April that are referred to the Financial Ombudsman Service after that date, the limit will rise to GBP160,000. Both award limits will be inflation-linked.

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