CLIFFORD

CHANCE

UK PENSIONS UPDATE – MARCH 2023

1. MARCH 2023 BUDGET: PENSIONS TAX REFORMS ANNOUNCED

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The Chancellor of the Exchequer has announced a series of reforms to pensions tax legislation as part of the budget delivered on 15 March 2023. These include that:

- the lifetime allowance ("**LTA**") charge will be removed from April 2023 before being abolished entirely in April 2024 under future legislation. The lifetime allowance charge currently imposes a tax on pension saving exceeding the cap of £1,073,100;
- the annual allowance cap will rise from £40,000 to £60,000;
- the minimum tapered annual allowance will increase from £4,000 to £10,000 and the adjusted income threshold for the tapered annual allowance will increase from £240,000 to £260,000;
- the annual money purchase allowance cap (the tax-free amount which individuals can contribute to their DC pension after claiming their pension) will increase from £4,000 to £10,000; and
- the maximum pension commencement lump sum available to individuals (without relevant lifetime allowance protections) will be frozen at its current figure of £268,275.

These changes will come into effect from 6 April 2023 (with the exception of the legislative abolishment of the LTA which will happen in 2024). The abolishment of the LTA cap simplifies the existing LTA protections regime, given that the protections that have been offered since 2006 (when the LTA cap was first introduced at the level of £1,500,000) will broadly no longer be relevant (save for those who benefit from protection in relation to their pension commencement lump sum). The government's aim is for these reforms to encourage people to remain in or to re-enter the workforce, but only time will tell if the changes have that impact. Over time, higher pension saving permitted by these reforms might facilitate individuals taking earlier retirement. For high earners affected by the tapered annual allowance there may be an incentive to reduce hours in order to benefit from the full annual allowance. For those who had previously stopped pension saving due to the LTA (or LTA tax protections in place) there may be urgent enquiries around re-joining schemes before the end of this tax year to make full use of unused carry forward annual allowances. Employers are likely to want to revisit policies around cash allowances offered in place of pension saving and schemes which have incorporated the statutory allowances into their rules may wish to consider how these changes affect them.

2. DB FUNDING CODE CONSULTATION

At the end of 2022, the Pensions Regulator ("**tPR**") published its long-awaited second consultation on the draft DB funding code (the "**Draft Code**"), including an explanatory consultation paper in relation to the Draft Code, a consultation paper on its Fast Track approach and a summary of responses to its first DB funding code consultation in March 2020[1].

[1] See our UK Pensions Update: March 2020

The Draft Code interprets the requirements of the funding and investment strategy regulations[2] (the "**Regulations**") which the Government consulted on last summer. The purpose of the Regulations and the Draft Code is to ensure that defined benefit ("**DB**") pension schemes are planning for funding over the long-term, with the aim of achieving low dependency on the employer by the time the scheme is significantly mature. See our UK Pensions Update: December 2022 for further detail on the Regulations.

There has been significant progress on some of the key issues identified with the first draft code. For example, the Draft Code has moved away (in the main) from the suggestion that the "Fast Track" funding is an objective starting point, and that departure from it must be justified. However, issues remain. As we have commented previously, where provisions in the Regulations give discretion to tPR to determine certain matters, it is likely that these delegations go beyond the scope of the Pension Minister's power to so delegate.

Broadly however, the Draft Code is helpful in interpreting the Regulations. The Draft Code:

- appears to recognise that the "low dependency investment allocation" is an assumption for funding purposes and not an overriding investment requirement that trustees must follow; and
- confirms that trustees should take account of the sustainable growth of the employer when setting the recovery plan, which is a concept missing from the Regulations but which is in line with tPR's statutory objectives.

Some key points to note include:

Concept	Commentary
Significant Maturity	• As anticipated, the Draft Code defines significant maturity[3] as the point at which a defined benefit ("**DB**") scheme reaches a duration of liabilities (i.e. weighted mean time for payment) of 12 years (although open schemes can make reasonable allowance for future accrual and new entrants). • However, recognising recent market volatility, other options are explored as part of the consultation.
Low Dependency	• Broadly, the Regulations define low dependency as being the point at which the scheme has sufficient assets invested in a low dependency investment strategy to provide for accrued benefits and it is not expected "*under reasonably foreseeable*" circumstances that further employer contributions will be needed. • As noted above, the Draft Code interprets the requirements around investment in a low dependency strategy more flexibly. For example, a low dependency strategy is not a requirement and a different strategy could be justified, e.g. if the scheme had a large surplus. The consultation notes that tPR does not intend to take a prescriptive approach to the actuarial assumptions for the low dependency funding basis – this will be principles based. • However, we remain concerned that the fact that tPR normally "expects" trustees to exercise their investment powers in a consistent way may be inconsistent with their legal duties under pensions investment regulations and trust law.
Employer Covenant	• The Draft Code sets out the key considerations and tPR's expectations for trustees relating to how they should assess their employer covenant strength – while most schemes will have been assessing employer covenant in practice, this is the first time it's been directly referenced in legislation.

2 *The Occupational Pension Schemes (Funding and Investment Strategy and Amendment) Regulations 2023*
3 Maturity is a measure of how far a scheme is through its lifetime.

	• The Draft Code introduces the concept of three periods over which employer covenant should be assessed being: (i) **visibility** of the employer's forecasts over the short term, (ii) **reliability** of the employer's available cash over the medium term and (iii) **longevity** of the employer covenant (i.e. how long will the employer continue to exist). These concepts are drafted somewhat prescriptively (visibility, for example, is expected to cover a period of one to three years and reliability six years) and seem at odds with tPR's claims that it is not moving towards an objective funding approach, a point that is likely to be made in consultation responses.
Twin Track Approach	• The Fast Track approach will act as a "filter" for tPR's assessment of actuarial valuations while the Bespoke approach will allow trustees to have scheme-specific funding arrangements. The consultation notes that valuations which meet the Fast Track criteria are unlikely to receive much scrutiny from tPR. • In Fast Track, tPR is setting a maximum recovery plan length of six years for schemes pre-significant maturity, which it notes is broadly consistent with the maximum period of covenant reliability. • Back-end loading of contributions will not be permitted in Fast Track (deficit reduction contributions should not increase by more than CPI inflation).

The consultation closes on 24 March 2023 and tPR's intention is for the Regulations and Draft Code to come into force together on 1 October 2023. While it's possible there might be delays where changes to the Regulations in the Government's response to consultation necessitate changes to the Draft Code, it seems unlikely in practice.

3. UPDATE ON AUTO-ENROLMENT BILL

The *Pensions (Extension of Automatic Enrolment) (No. 2) Bill* (the "**AE Bill**"), a private members' bill, recently completed its second reading in the House of Commons and received the formal backing of the Department of Work and Pensions (the "**DWP**"). The AE Bill broadly seeks to lower the current minimum age threshold for automatic enrolment to 18 and to eliminate or at least reduce the lower qualifying earnings threshold (so that contributions are payable on more earnings). The AE Bill would not lead to immediate legislative change if passed but would grant the Secretary of State powers to bring about the reforms.

The Government has recently reiterated[4] its commitment to a "mid-2020s" implementation of automatic enrolment reforms recommended by the House of Commons Work and Pensions Committee back in 2017 (which include the reforms sought by the AE Bill), indicating that even if the AE Bill passes, any powers granted to the Secretary of State might not be used immediately.

4. DC REFORM PACKAGE ANNOUNCED

On 30 January 2023, the Government announced a package of reforms directed at furthering the Government's three pillar vision for defined contribution ("**DC**") pension savers of fairness (given the intergenerational gap of DB vs DC), adequacy (given studies show DC pots may not prove sufficient to meet individuals' retirement needs) and predictability (given the uncertainty as to what an individuals' DC pot will provide them in retirement). These reforms are set out in a Value for Money consultation, a Collective Defined Contribution ("**CDC**") consultation and a call for evidence in respect of small DC pension pots which all close on 27 March 2023. The government has also provided its response to a previous consultation on illiquid assets.

[4] See the Government's response to "Recommendation 3" in its response to the House of Commons Work and Pensions Committee's 27 July 2022, "*Protecting pension savers – five years on from the pension freedoms: Saving for later life"* report.

Key points to note include:

Value For Money Consultation	• The consultation notes the three key elements of the VFM framework as being (i) investment performance, (ii) costs and charges and (iii) quality of services. The idea being that improvements in these key areas will drive up the value of DC savings by forcing transparency on DC providers and ensuring that savers are given the quality of service they need to make informed decisions along the saving journey to retirement. • The consultation considers new powers for tPR to force wind-up or consolidation of underperforming schemes. The aim is that small underperforming schemes with less than £100m in assets will either need to improve, consolidate or exit the market. • The VFM framework will not cover small, self-administered schemes or executive pension plans, and default arrangements with assets under a certain threshold will also be excluded. • For trust-based occupational pension schemes, trustees would be expected to assess the VFM of their scheme and make decisions on actions that would improve VFM.
CDC Consultation	• The consultation is said to be in response to industry appetite for whole-life unconnected multi-employer CDC schemes that are more flexible than the current single and connected employer model. • The consultation seeks views on how new CDC models might operate (noting that the Government wishes to draw on DC pension successes in other countries such as Australia, Canada and Norway), and what aspects of the existing regime (e.g. as to authorisation criteria, fit and proper persons, the continuity strategy, valuations and benefit adjustments) should be read across to the new regime(s). • Areas of complexity with the new model are identified (e.g., who is responsible for establishment costs, where will extra sources of funding come from in a downside scenario and should there be a "scheme funder" as for master trust arrangements). • The consultation also considers decumulation CDC schemes and whether there is industry appetite for such arrangements. In particular, the Government is keen for a greater understanding of how decumulation CDC schemes would work (e.g., how will they achieve economies of scale when reliant on members transferring in and who will bear the set-up costs etc). • It is worth noting that the first single / connected employer CDC scheme will not be live until 2024, so it is likely that these proposals may change significantly following the Government's assessment of how the current CDC model works in practice.
Small Pots Call for Evidence	• The call for evidence is intended "*to deepen the evidence base around the scale and characteristics of the growth in the number of deferred small pots*". The Government is seeking views on the optimal large-scale automated[5] solution that can deliver a material reduction in small pots and overall net benefits for the saver. • The call for evidence seeks views on matters such as what size of pot should be in scope and how long pots need to be inactive to be in scope.

5 The Government notes that member-initiated consolidation will not serve to change the growth in deferred small pots and therefore an automated solution is needed.

	• Several solutions are proposed: ○ **Pot-follows-member** – when an employee moves jobs their deferred pension pot would automatically move with them to their new employer's scheme, with members able to opt out if they want to. ○ **Market-wide automatic consolidation** – in-scope small pots would transfer automatically to a small pot consolidator, with members given the option to opt-out if they want to. ○ **Member exchange** – while not the Government's preferred solution this is mooted as a possible complementary solution. Under this solution, pension providers would "match" up pots for a member and transfer the pots to the provider currently receiving active member contributions.
Illiquid assets	• The original consultation sought views on new draft regulations and guidance introducing 'disclose and explain proposals' which are designed to encourage DC pension schemes to broaden their investment approaches to ensure they are considering as diverse a range of assets as possible, and on the exemption of performance-based fees from the regulatory charge cap. • Amendments have been made to the regulations[6] originally proposed, for example, to require schemes that invest in illiquid assets to include in their default Statement of Investment Principles an assessment of the advantages to members of investing in illiquid assets and, in relation to the exemption of performance-based fees from the DC charge cap, amendments so that collective investment arrangements can benefit from the change. • The regulations include a new requirement for the impact of the new measures to be reviewed by the Government at least every five years. • The regulations also correct an error in pensions dashboards staging timetable in relation to master trusts that provide money purchase benefits only which currently state that the staging date for such schemes with 10,999 – 19,999 relevant members is 30 September 2023 (although staging dates are now being reset – see below). The draft regulations substitute "10,999" with "10,000". • The Regulations have been laid before parliament and are expected to come into force in April 2023. Accompanying statutory guidance has also been published.

5. PENSIONS DASHBOARDS "RESET"

In a ministerial statement made on 2nd March 2023, the Pensions Minister announced a "reset" of the Pensions Dashboard Programme following "delays" to the delivery of the technical systems needed to connect pension providers and schemes in accordance with existing connection deadlines. It is likely that connection deadlines will be pushed back by several months at the very least and the Government has committed to providing a further update on timing before its summer recess as well as legislating "at the earliest opportunity" to amend the timing of various obligations in order to provide clarity to schemes.

The *Pensions Dashboard Regulations 2022* came into force on 12 December 2022 and as we noted in our previous newsletter (see our UK Pensions Update: December 2022), trustees remain responsible for compliance with their statutory dashboard duties regardless of any duties that have been outsourced to third-party administrators. We would recommend

[6] The draft *Occupational Pension Schemes (Administration, Investment, Charges and Governance) and Pensions Dashboards (Amendment) Regulations 2023*

that trustees continue to progress their plans to implement Pensions Dashboards duties and obligations under the legislation notwithstanding this reset.

6. PENSIONS DASHBOARDS ENFORCEMENT CONSULTATION

tPR is currently consulting on its draft dashboards compliance and enforcement policy (the "**Dashboards Enforcement Policy**"). The Pensions Dashboards Regulations 2022 (the "**Dashboard Regulations**") introduced new duties on certain trustees and scheme managers to enable dashboards to function. As well as being responsible for regulating compliance of trustees with the dashboard regime, the legislation includes new powers for tPR to pursue third parties where tPR is of the opinion that they have caused the scheme, wholly or partly, to be in breach of Dashboards Regulations. [7]

The consultation sets out various principles tPR will follow when considering enforcement action, including that tPR:

- will take a risk-based, proportionate, and pragmatic approach to compliance;
- will focus on the quality of the data held by schemes (given the success of dashboards relies on the quality of this data);
- will also focus on the governance of schemes; and
- will consider using its powers against third parties on whom pension schemes are highly dependent in order to comply with their duties.

The draft policy notes that tPR will consider a range of factors before deciding to act, including the nature and scale of the impact of any breach in the requirements, a scheme's compliance history, whether there has been wilful non-compliance, and the trustees'/manager's openness and co-operation with tPR. Schemes will need clear audit trails of the steps they have taken to prepare to comply with the duties under the Dashboard Regulations and a record of steps taken to resolve any issues that have arisen. The draft policy confirms tPR's expectation that trustees will keep records of their matching policy, and the steps taken to improve their data (noting here that even where trustees delegate responsibility to third parties, ultimately, they remain responsible for ensuring the accuracy of the scheme's data and compliance with the Dashboard Regulations).

Given tPR's powers to issue £5,000 penalties to individuals and £50,000 for corporates, significant work is underway to ensure that schemes are ready to meet the duties under the Dashboard Regulations. And trustees should remain mindful that, assuming the private members bill[8] currently in the House of Lords comes into force, trustees may be committing a criminal offence and be liable for a civil penalty if they reimburse themselves out of scheme assets for tPR fines in respect of breaches of their duties under the Dashboard Regulations.

The Dashboard Enforcement Policy primarily addresses circumstances where trustees / third parties fail to comply with the duties placed upon them by the Dashboard Regulations (and this is what tPR's examples of enforcement in the draft policy focus on). However, industry concerns (and in particular those of trustees) are also directed at the risk that members misinterpret the information provide to them by dashboards and make financial and lifestyle decisions based on that misinterpreted information. In those circumstances, it's not clear where the liability will necessarily sit, and in practice, it will be fact specific.

Helpfully the consultation on design standards for pension dashboards proposes that dashboards should include a detailed explanation to individuals using the service as to what the figures they are being shown mean (e.g., they are not guaranteed and in some cases are based on certain assumptions such as retirement age and inflation). And it remains to be seen how schemes' matching policies will reflect the anxiety of inadvertent data breaches.

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[7] The Financial Conduct Authority ("**FCA**") has made rules for, and regulates, the compliance of FCA-regulated pension providers with their separate obligations in relation to dashboards in respect of personal and stakeholder pension schemes, and these are not in scope of this policy.

[8] *The Pensions Dashboards (Prohibition of Indemnification) Bill*

Finally, given the stringent requirements of the FCA on the measures dashboard providers must take to ensure security compliance and the fact that the service must be free, it will be interesting to see if there are any new players to the dashboard market or whether only existing FCA authorised entities see value in providing a dashboard service.

The consultation on tPR's Dashboard Enforcement Policy closed on 24 February.

7. LIABILITY DRIVEN INVESTMENTS

Many schemes with LDI strategies were affected by the rapidly moving gilt yields inflation in 2022. That has led to a wide variety of commentary (some valid, some misplaced).

In a letter to the Work and Pensions Committee ("**WPC**") on 20 January 2023, tPR has said that its collaboration with the Bank of England ("**BoE**") and the Financial Conduct Authority ("**FCA**") will stretch beyond monitoring resilience of LDI funds against the levels set out in its November 2022 guidance. tPR has also said that it will "*look at the regulatory architecture and see what changes need to be made for more effective oversight and regulation*"; it is expected that tPR's Annual Funding Statement due to be published in the Spring will comment on any future changes in this regard.

tPR also acknowledged in the letter that it may be necessary to replace its current voluntary system of annual data collection with a "*system where schemes notify us where they are unable to maintain a minimum buffer level – this may be through the notifiable events process*". tPR noted that it is discussing the possibility of introducing such a notifiable event with the **DWP** as a means to achieve 'real time' collection of relevant data, and that should this go ahead, schemes would be encouraged to comply on a voluntary basis before appropriate regulation is in place.

In a letter to the Economic Secretary to the HM Treasury and the Minister for Pensions on 7 February 2023, the House of Lords Industry and Regulators Committee ("**IRC**") set out several recommendations to the Government on pensions schemes' use of LDI:

- noting that LDI uptake was "*largely accounting-driven*", the IRC has called on the Government to review the pensions accounting system to consider whether there is a more appropriate accounting standard which reflects the long-run return on pension asset portfolios (as against the current system which may show an accounting deficit despite the fact that the expected returns from an investment strategy should allow future commitments to be met);

- describing the use of leveraged LDI by pension schemes as being "*contrary to at least the spirit of UK and EU legislation*" which prohibits schemes from borrowing (note that in our view this is incorrect), the IRC has called for its use to be more tightly controlled and has recommended that if leveraged LDI continues to be allowed, there should be far stricter limits and higher reporting requirements on leverage and liquidity buffers;

- the IRC echoed the FCA's call for investment consultants to be brought within the regulatory perimeter; and

- the IRC has recommended that regulators collect sufficient information on pension scheme leverage and stress tests, and that the Government should consider giving the BoE's Prudential Regulation Authority a role in overseeing pension schemes (particularly those pursuing more "*bank-like*" strategies and investments). It also recommended that tPR be given a statutory duty to consider the impact of the pensions sector on the wider financial system, with the BoE's Financial Policy Committee being given the power to direct action by regulatory bodies in the pensions sector if they fail to take sufficient action to address risks.

It remains to be seen whether the government will adopt any of the IRC's recommendations. However, with the above statements from tPR, the BoE's call for "*regulatory action to ensure LDI funds keep their higher levels of resilience*" in its December 2022 Financial Stability Report and general industry feedback, pressure is mounting on the government to legislate in this area.

8. ECONOMIC CRIME AND CORPORATE TRANSPARENCY BILL

Further to the reforms proposed in the Government's White Paper issued in February 2022 (see our UK Pensions Update: August 2022), the Economic Crime and Corporate Transparency Bill[9] (the "**ECCT Bill**") has had its second reading in the House of Lords and, if passed, will enact corporate reforms that include those which may impact on corporate pension trustees, including:

- Compulsory identity verification for a wide range of persons; and
- A requirement for corporate directors to have only natural persons on their boards.

Identity verification will apply to all new and existing directors, persons with significant control, directors of relevant legal entities, members of limited liability partnerships and general partners of limited partnerships. It will also apply to individuals delivering documents to Companies House on their own behalf, or on behalf of another. Verification will be possible directly, or through an authorised provider.

Individuals cannot act as a director until their identify has been verified and their appointment as a director must be notified to Companies House within 14 days. Individuals will commit an offence and may be liable to a civil penalty for breach of these requirements, and a company will similarly be committing an offence if it has unverified directors on its board.

The Company's Act 2006 already includes uncommenced provisions restricting the use of corporate directors, and these restrictions will be brought into force so that a company will only be permitted to retain/ appoint a corporate director if all of that corporate director's own directors are natural persons. It's also worth noting that overseas corporate directors will not be permitted.

The above are just a few of the Companies House reforms being made in the bid to tackle economic crime and improve transparency over corporate entities in the UK to ensure reliability of information and credibility of company formation. The intention is for the ECCT Bill to become law in the Spring, and so we would encourage early preparation to ensure that existing director appointments are reviewed and processes are put in place to ensure that all future director appointments and other individuals who may be affected by the requirements are aware of the changes and comply as necessary when the ECCT Bill becomes law.

9. RETAINED EU LAW BILL REACHES THE HOUSE OF LORDS

The Retained EU Law (Revocation and Reform) Bill (the "**REUL Bill**") which, broadly, would allow for the revocation or amendment of EU law retained in domestic law under the European Union (Withdrawal) Act 2018 and which removes the special features retained EU law has in the UK, completed its second reading in the House of Lords on 6 February 2023. It faced widespread cross-party opposition at the second reading, with many speakers condemning the "*unprecedented level of transfer of power from Parliament to the Executive*" contemplated by the powers in the Bill. The REUL Bill completed the committee stage on 8 March 2023 (where it continued to face opposition) and will proceed to the report stage next on 19 April 2023.

In our UK Pensions Update: December 2022, we noted the very real concerns about the potential for legal uncertainty given the broad scope of the sunset provisions. As highlighted in the second reading debate, there is also further potential legal uncertainty in respect of the powers the Bill gives to ministers to preserve, revoke and replace retained EU law through statutory instruments. The House of Lords Delegated Powers and Regulatory Reform Committee released a report on 2 February 2023 calling the Bill so lacking in substance as to be "hyper-skeletal", and stating that it represents a significant departure from the existing position under which Parliament, and not ministers, has the power to amend or repeal retained EU law through primary legislation. The report, which was frequently referred to by Lords opposing the Bill at the second

[9] The ECCT Bill follows the *Economic Crime (Transparency and Enforcement) Act 2022* which became law in March last year and which, broadly, is directed at ensuring higher standards of diligence on overseas wealth entering the UK. It includes, for example, the establishment of a new Companies House register of overseas entities that own qualifying real estate in the UK.

reading, calls for the removal of five of the six most important provisions of the Bill which delegate to Ministers powers to preserve, repeal, revoke, and replace REUL, noting that these are all inappropriate delegations of legislative power.

10. MEMORANDUM OF UNDERSTANDING BETWEEN THE DWP AND TPR

On 7 February 2023, the DWP and tPR published a memorandum of understanding between the two entities setting out details of their co-operation, co-ordination and respective roles in relation to the prosecution of offences under sections 58A and 58B of the Pensions Act 2004 (the "**PA 2004**"). Though it should be noted that the MoU is not legally binding, it nevertheless helpfully sets out that:

- consistent with the principle of "no duplication", while both the Secretary of State and tPR are designated prosecutors in relation to the offences under sections 58A and 58B PA 2004, it is expected that tPR will bring prosecutions under the offences rather than the Secretary of State;

- it is expected that the Secretary of State would not initiate a prosecution against a person for offences under sections 58A or 58B PA 2004 where tPR has decided against prosecution; and

- it is expected that the Secretary of State would only bring prosecutions under sections 58A and 58B PA 2004 where tPR ceases to exist, where tPR's ability to prosecute is otherwise hindered or in exceptional circumstances. Should the Secretary of State decide to bring a prosecution, it will consider tPR's latest policy and/or guidance to the investigation and prosecution offences.

This latest MoU sits alongside a 'Tripartite MoU' dated February 2008 setting out a trilateral framework for co-operation between the DWP, tPR and the Pension Protection Fund which takes precedence over this latest MoU in the event of any conflict.

11. KEY CASE LAW ROUND-UP 2022 / ON THE HORIZON FOR 2023

1. Age Discrimination:

The Secretary of State for Work and Pensions v (1) Mr D Beattie and sixteen others (2) 20-20 Trustee Services Ltd (3) Federal Mogul Ltd: [2022] EAT 163

Summary: In a preliminary hearing to decide whether it had the jurisdiction to hear an age discrimination case, the Employment Tribunal determined that Article 3 of the Age Exceptions Order to the Equality Act 2010 should be disapplied. Article 3 broadly prevented age discrimination claims from being brought against schemes in relation to rights accrued / benefits payable in respect of members' pensionable service prior to 1 December 2006. However, on appeal (with the Secretary of State for Work of Pensions having joined the action) the Employment Appeal Tribunal reversed this – it found that the Withdrawal Act 2018 restricted the ability of individuals to bring claims in relation to rights that were previously established under EU Law and which ceased to be incorporated within domestic law on and from 31 December 2020. This meant that Article 3 could not in fact be disapplied in connection to claims falling after 31 December 2020, meaning that only two of the members who had brought their claims before this date will have their age discrimination claims heard by the Employment Tribunal.

Relevance: Trustees and employers will be comforted by this decision. And while judgments by the Employment Tribunal are not binding on higher courts and so it cannot be said with certainty that a higher court considering a similar matter in the future will interpret the application of the retained EU law regime in the same way, it seems unlikely that a court would reach a different position but this may well also depend on the outcome of the REUL Bill.

2. Factoring ESG into trustees' decision-making and investment powers:

Butler-Sloss and others v Charity Commission for England and Wales and another [2022] EWHC 974 (Ch)

Summary: Two charitable trusts proposed restrictive new investment policies which would align with the Paris Agreement, out of concern that their existing investment policies (which were not so aligned) conflicted with their principal charitable purposes of "environmental protection or improvement". The trusts had the power to implement these policies but sought the court's approval of the process behind their approach. The court held that trustees must "reasonably balance all relevant factors" when determining investment policies, including the likelihood/seriousness of a potential conflict with their charitable purpose and any potential financial impact, and found that both trusts had done so in this instance (though it refused to formally approve the process behind the trustees' approach).

Relevance: While the judgment provides helpful clarity in relation to trustee investment duties in the context of charitable trusts, pension scheme trustees should be wary about applying the case in the context of pension scheme trustee investment duties. The law in the context of pension scheme trustee investment duties remains that ESG and climate change risk matters are to be taken into account to the extent that they are financially material.

McGaughey and another v Universities Superannuation Scheme Ltd and another [2022] EWHC 1233 (Ch)

Summary: The trustee of the Universities Superannuation Scheme ("**USS**") carried out an actuarial valuation a year earlier than statutorily required, and following the deficit identified under that valuation, made various changes to members' benefits and contributions. Two members subsequently brought a "multiple derivative claim"[10] against the directors and former directors of the corporate trustee in respect of alleged breaches of fiduciary and/or statutory duty claiming that: (a) the trustee directors had breached their statutory duties in proceeding with the 2020 valuation; (b) the impact of the benefit changes was indirectly discriminatory against women, minorities and young people, who were disproportionately affected; (c) the directors had breached their duty to avoid conflicts of interest by benefitting from an increase in costs and expenses since 2007, and; (d) the directors' failure to divest from fossil fuels harmed the trustee company's long-term interests. The court dismissed each claim and refused the claimants' application to continue their multiple derivatives claims, broadly on the grounds that they had failed to establish sufficient interest or standing to pursue their claims for the purposes of satisfying the common law principles for multiple derivative claims (for example, they had failed to demonstrate that fraud had been committed and the minority were prevented from remedying it because the trustee company is controlled by directors). With respect to the judge's view on the claim regarding fossil fuels, he was not satisfied that the trustee had suffered any immediate financial loss because of the directors' failure to divest from fossil fuels and considered the directors' investment decisions were well within the trustee's discretion

Relevance: The case demonstrates the high bar that must be met for pension scheme members to have standing to bring derivative claims against directors of trustee companies. However, noting the weight placed by the judge on the detailed evidence of the trustee directors' investment decision making and how their discretion was exercised, it is a timely reminder for trustees to have robust decision-making processes in place when exercising their investment powers and to maintain records to evidence compliance with their duties (in particular given the current environment, focus on climate change risk and potentially increased attention on trustee investment strategy by members).

The claimants were granted leave to appeal and a hearing date is required to occur by 11 December 2023.

3. Rectification

CMG Pension Trustees Ltd v CGI IT UK Ltd [2022] EWHC 2130 (Ch)

Summary: This case concerned the proper construction of a rule which the defendant employer argued acted to forfeit members' benefits. Benefit arrears had fallen due following failed attempts to equalise members' normal retirement dates and to apply reduced benefit accrual rates, and the employer argued that use of the rule could substantially limit the arrears to be paid such that those arrears should not be paid in respect of underpayments which were made more than six years earlier (though the trustee had made some arrears payments already without considering the disputed rule). The court held that the rule is a forfeiture provision and should be construed on the basis that any benefit or instalment of a benefit which

[10] A claim against wrongdoers (in this case the trustee directors) on behalf of a company (in this case the trustee company) where the claimant is not a shareholder of the company on whose behalf the claim is brought.

has not been claimed within six years of the date on which it fell due for payment is forfeited and the entitlement to that benefit or instalment is extinguished.

Relevance: Following the *Lloyds* and *Axminster* cases, this case provides further welcome clarification to pension trustees and to employers on the proper construction of forfeiture clauses and on how to deal with arrears issues arising from benefit rectification exercises. Following *Axminster*, it makes clear that making a "claim" requires the express or implied assertion of a right or entitlement (and that members do not necessarily need to be aware of that right or entitlement). As to recoupment where a person has been incorrectly paid arrears after their entitlement to those arrears has been extinguished, following *Burgess v BIC UK Ltd* the judge also confirmed that where a member disputes the amount to be recouped such that a court order is necessary, the Pensions Ombudsman is not a competent court for these purposes. Finally, it also follows *Lloyds 1, Lloyds 2* and *Axminster* in confirming that an interest rate of 1% above base rate is appropriate for arrears payments – it should be noted, however, that the judge considered whether recent inflation rate increases might justify a higher rate of interest. While it was decided that this was not appropriate for the periods for which interest was payable in this case, it shows that the court may take into account prevailing inflation rates when determining appropriate rates of interest.

The claimants were granted leave to appeal and the hearing date is awaited.

4. Limitation for negligent acts

PSGS Trust Corporation Ltd v Aon UK Ltd [2022] EWHC 2058 (Ch)

Summary: The claimant trustee brought a claim for negligence against a professional services provider for failure to properly advise on two rule amendments to a pension scheme; the changes were intended to close the scheme to new members and then to future accrual, but both were entered into by retrospective deed and so were not effective (having contravened s.67 of the Pensions Act 1995). The defendant provider applied for summary judgment seeking to strike out the claims on the grounds that the limitation period for bringing the claim had since passed under the Limitations Act 1980, but the trustee argued that it could rely on Section 14A of the Limitation Act 1980 (i.e. that it did not have sufficient knowledge to bring a claim prior to the three years preceding standstill agreements it had entered into with the defendant when it was alerted to the errors). The court held that it was arguable that the claimants had in fact not had the required knowledge to bring a claim for negligence until receiving further legal advice in 2014 that the retrospective amendments were unlikely to have had the desired effect, and the application for summary judgment subsequently failed.

Relevance: Though the full case itself is yet to be heard at trial and argued with full evidence, this case adds to the body of law around the usefulness of standstill agreements in pensions litigation.

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