



Making the law

By Pippa Stephens | 21 December 2011 |

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It has been a busy year in pensions law, with the Bridge Trustees and Prudential cases, and the latest development of the Lehman/Nortel litigation – which looks set to rumble on into 2012.

Also on the horizon over the next year are changes for the Pensions Regulator, auto-enrolment and a case regarding sex-specific actuarial calculations for calculating annuities.

The key legislative changes in 2011 create a markedly different landscape of pensions law to be negotiated by trustees and lawyers alike. The cases that contributed to the status quo are discussed below.

Bridge Trustees

The *Houldsworth vs Bridge Trustees* case in the Supreme Court involved the definition of money purchase benefits and what constitutes a money purchase benefit.

Jennie Kreser, partner at Silverman Sherliker, says: “Essentially, the Supreme Court ruled the statutory definition of money purchase benefit (the requirement for money purchase benefits to be “calculated by reference to” contributions) did not mean they had to be calculated on contributions, in the sense that no other factor could be taken into account.

“This could have the effect of widening the scope of what we thought money purchase benefits can be.”

Lesley Browning, partner at Norton Rose, agrees the case was one of the major ones of 2011.

She says, alongside the Department for Work and Pensions’ (DWP) reaction to it, it would have “significant consequences” for schemes where those who would qualify as defined contribution (DC) under the Supreme Court ruling and as defined benefit (DB) following the changes to the DWP.

She says the administrative burden on schemes will be substantial and large costs could potentially be incurred as a result of the ruling.

“For example, schemes which provide internal annuitisation or some kind of underpin [for example, a guaranteed pension increase] will, without government intervention, be defined benefit,” Browning adds.

The fact the DWP proposes to make its legislation retrospective to January 1, 1997 will leave affected schemes with many questions to resolve:

- how has the scheme funding regime been applied since 2004?;
- should Pension Protection Fund (PPF) levies have been paid?;
- should section 75 debts have been triggered by employers that have ceased to participate?;
- how should members who have left or retired since 1997 be dealt with?

It is hoped by many the frequently blurred dividing line between DB and DC schemes will be clarified by the Bridge case – and further legislation will be required at the very least the transitional provisions required.

Bonas

The Bonas case involved the regulator initially seeking to win £21m from Michel Van de Wiele, the managing director of Belgian company VdW, for the outstanding deficit when its UK subsidiary Bonas went into a pre-pack administration in 2006.

The business was subsequently bought out of administration by its parent, while its scheme entered the PPF assessment period. Silverman Sherliker’s Kreser says: “Bonas was yet another example of the poor judgment of the regulator.”

The Upper Tribunal clipped the regulator’s wings by making it clear the amount in a contribution notice should not exceed the detriment to the member.

Eventually, the regulator settled for £60,000 – only after some criticism from the judge who, while refusing permission to strike out the contribution notice, nevertheless said the claim was excessive. “Both previous and subsequent decisions of the regulator have called its judgment in question,” Kreser adds.

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Prudential

Prudential's High Court victory over its members this year clarified trustees' legal responsibilities when exercising their powers. The case a pensions dispute had been judged using the renewed Hastings-Bass principle, where a transaction that has been entered into by the unintended consequences can be set aside and/or undone.

The determination stated trustees must familiarise themselves with their scheme rules and the powers they hold. It also stressed the imp schemes acting with reasonable care and skill when using their powers.

Norton Rose's Browning says although the Prudential case was not a huge surprise for the pensions industry, it was undoubtedly a disa members of the Prudential scheme, who had come to expect a certain level of benefit, and for members of other schemes, where the ru discretionary pension increase provisions.

"The move from RPI to CPI was met with widespread concern by pension scheme members in both the public and private sector and thi done nothing to reassure them," she says.

Nortel/Lehman

One of the most eagerly anticipated and influential cases to occur this year was the Nortel/Lehman case.

In 2010, the regulator issued two financial support directions (FSD) against Lehman Brothers to pay more than £148m and £2.1bn resp deficits in their UK pension plans.

The regulator won its initial dispute with Justice Briggs, that where FSDs were issued against a company after insolvency, the cost of co direction was an expense in that insolvency.

The judgment was also upheld in the Court of Appeal, which agreed pension scheme liabilities should be prioritised over other unsecure companies collapse.

Louise Inward, counsel at Pension Corporation, says: "To the surprise of no one, the Court of Appeal upheld the judgment of the High C an expense of administration.

"Encouraging the regulator to issue FSDs to insolvent companies, in order to give the pension debt super priority, will have the unintenc of discouraging investment in companies associated with final salary schemes."

Inward says she would be looking to see what the Supreme Court decides when it considers the matter next year and adds the House o look at the case.

Zoe Lynch, partner at Sackers, agrees: "The stakes are high so look out for the Supreme Court decision on this in 2012."

Norton Rose's Browning says she hoped legislation will be introduced to clarify the rather unsatisfactory situation that creates super pri

Other cases of note

The European Court of Justice Test-Achats case forces insurance companies to base the value of annuities on unisex factors from Dec typically resulting in smaller pensions for men and larger pensions for women.

Sex-specific actuarial factors can still be used by occupational pension schemes, or at least for now, says Olivia Mylles, an associate in department at Mayer Brown.

"The move from RPI to CPI was met with widespread concern by pension scheme members in both the public and private sector and this ruling will have done nothing to reassure them"

2012 and beyond

Mylles says to look out for equalisation of guaranteed minimum pensions (GMPs) after the PPF anr study to test its proposals earlier this year, adding a general consultation exercise for all affected p expected next year.

A new code of practice on incentive exercises is expected next summer, says Mylles, so the trend fr continue. "It seems possible the law will restrict the use of cash incentives to tempt members out of [pensions minister] Steve Webb's forthright views on these," she says.

Pension Corporation's Inward says 2012 will hopefully be "a year without substantial legislative cha industry seeks to implement auto-enrolment and assess its impact on the remaining open DB schei "The courts may well be busy, though, whatever the outcome of the case against the government r RPI/CPI change. Many employers may have appeared to make contractual promises and will end u

However, Inward adds more regulatory cases could also be on the horizon, as the regulator has be exercise a number of its powers, which she expects will reach the Upper Tribunal.

Sackers' Lynch said some of the practical issues the regulator has been focusing on will come hom two governance issues bookmarking the year.

"At the start of 2012, trustees will have to identify their statutory employers on their scheme return ;

the year the record-keeping requirements will bite. Trustees that have not yet started looking at ensuring the accuracy of 100% of new legacy data by December 2012 should do so now," she warns.

Finally, Matthew Swynnerton, partner at DLA Piper, says he expects to see the regulator continuing to focus on the governance of DCs in its July 2011 discussion paper and recent statement on the role of DC trustees.

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