

**STEPHENSON  
HARWOOD**  
pensions law group

CLEAR VIEWS

Quarter Four 2023 update  
November 2023

## OVERVIEW

---

### Priorities for trustees this quarter are to:

- Consider whether they are impacted by the decision of *Virgin Media Ltd v NTL Pension Trustees II Ltd & Ors*. This decision is relevant for schemes which were contracted-out on a defined benefit (**DB**) basis from 6 April 1997. In this case, the court held that certain amendments made to contracted-out benefits accrued between 1997 and 2016 are void if they were introduced without written actuarial confirmation, as required under Section 37 of the Pensions Schemes Act 1993 (**PSA93**). This case could have potentially far-reaching implications.
- Understand how the Mansion House proposals may impact their pension scheme. Aspects of these proposals will impact both DB and defined contribution (**DC**) schemes.
- Ensure that they are on track to meet the new single mandatory deadline for pension dashboard connection of **31 October 2026**, by which all in-scope occupational pension schemes will need to have connected to a pension dashboard.
- Consider whether they need to revise scheme documentation as a result of recently published draft legislation, which sets out how the Government will seek to implement the second phase of the abolition of the lifetime allowance. This is scheduled for April 2024.

### In addition, trustees should be aware that:

- As a result of *Brass Trustees Ltd v Goldstone*, the court may support a trustee's request to ultimately force the winding up of a pension scheme. A trustee may petition the court for the winding up of the employer when sponsors have fallen behind with their financial obligations to the scheme.
- In *BBC v BBC Pension Trust Ltd & Anor*, the court held that an amendment power, which prevented amendments which would "*substantially prejudice*" the members' "*interests*", protected future pensions accrual in the context of the scheme in question. This means that, other than in very limited circumstances, it will be difficult for the BBC to make changes to active members' future service benefits using the scheme's amendment power. Trustees should bear this in mind if they have a similar amendment power in their scheme.
- The case of *Killik & Co LLP v HMRC* confirms the position in *Revenue and Customs Commissioners v Sippchoice Ltd* (**Sippchoice 2**), which held that in specie contributions and contributions as payments in kind to a Self-Invested Personal Pension Scheme (**SIPP**) will not receive tax relief.
- The Pension Ombudsman's determination in the case of *Mr Y* has reiterated that a sponsoring employer's, trustees' and scheme administrator's duties do not extend to warning members about personal tax implications as a result of options around the taking of benefits.

## KEY DEVELOPMENTS

Development	Date of change	Links to further information
<p><a href="#">Certain amendments to contracted-out defined benefit schemes may be void - <i>Virgin Media Ltd v NTL Pension Trustees II Ltd &amp; Ors</i></a></p> <p>This case concerned so-called "section 9(2B) rights" which are a type of contracted out benefit. Section 9(2B) rights were accrued in certain contracted out schemes between 1997 and 2016 and were subject to certain protections. There is a provision in the PSA93 which required that alterations to these types of benefits were to be accompanied by a confirmation from the scheme's actuary (i.e., a s37 certificate) that, if the alteration was made, the scheme would continue to satisfy the "reference scheme test".</p> <p>In this case, the court was asked to consider three questions:</p> <ol style="list-style-type: none"> <li>1. Does Section 37 PSA93 render an amendment made in the absence of a s37 certificate void to any extent? If so, issues 2 and 3 then arise.</li> <li>2. Do such validity concerns apply to service accrued prior to such an amendment, or would they apply to service after that amendment?</li> <li>3. Would Section 37 PSA93 have such an effect only in relation to <i>adverse</i> alterations to section 9(2B) rights, or in relation to all alterations to such rights?</li> </ol> <p>The court held that:</p> <ol style="list-style-type: none"> <li>1. Section 37 PSA93 would render an amendment to rules of a contracted-out scheme which relates to section 9(2B) rights void if the change was made without a s37 certificate.</li> <li>2. Both past and future services rights are caught by the legislation.</li> <li>3. Voidness applies to all alterations to section 9(2B) rights and not merely those that would or might adversely affect such rights.</li> </ol> <p>This would mean that, even if the attempted change itself was otherwise unproblematic, the absence of a s37 certificate would render the attempted change invalid, at least until a later change was made with a s37 certificate. Trustees should consider whether their scheme is impacted by this decision.</p>		<p>Further information on this topic can be found in our briefing <a href="#">here</a>.</p>
<p><a href="#">Mansion House proposals</a></p> <p>On 10 July 2023, Chancellor Jeremy Hunt discussed the 'Mansion House reforms'. The key proposals are:</p> <ul style="list-style-type: none"> <li>• <a href="#">DB superfunds</a></li> </ul>		<p>The Mansion House proposals can be found <a href="#">here</a>.</p> <p>Further information on this</p>

<p>The Department for Work and Pensions (<b>DWP</b>) wants to implement a permanent superfund regulatory regime to provide sponsoring employers and trustees with an alternative buy-out option.</p> <ul style="list-style-type: none"> <li>• <b>Options for DB schemes</b> The DWP aims to increase investment in productive asset classes.</li> <li>• <b>Implementation of the DC value for money framework</b> Where a scheme is found to have poor value against its peers, it will have a defined timeline to improve. The Pensions Regulator (<b>Regulator</b>) will have new powers to enforce wind up and consolidation if it does not. Primary legislation is to come on this point.</li> <li>• <b>A solution for deferred small pots</b> The DWP proposes to introduce a multiple consolidator model for small pots.</li> <li>• <b>DC decumulation</b> The DWP proposes that trustees of DC schemes will have a new duty to offer decumulation services which are suitable for their members.</li> <li>• <b>Extension of Collective DC schemes (CDC)</b> Hunt proposed setting out a roadmap to encourage CDCs.</li> <li>• <b>Trustee skills, capability and culture</b> By enhancing trustee expertise, especially in investments, the DWP hopes that allocations to illiquid assets might increase. It is worth noting that the Government stopped short of proposing professional trusteeship as a requirement for all schemes.</li> </ul>		<p>topic can be found in our briefing <a href="#">here</a>.</p>
<p><b>Revised pensions dashboard deadline</b></p> <p>In March, it was announced that the connection deadline for pension dashboards would be delayed in order to ensure that the pensions industry had adequate time to prepare.</p> <p>New draft regulations (the draft Pensions Dashboard (Amendment) Regulations 2023) have now been laid out. The regulations provide a mandatory connection deadline of <b>31 October 2026</b>, by which all in-scope occupational schemes will need to have connected to a dashboard. The 'dashboard available point' - the date from which pension dashboards will be available for use by the public - could be earlier than this.</p>	<p>31 October 2026</p>	<p>Further information on this topic can be found in our briefing <a href="#">here</a>.</p>



<p><a href="#">Draft legislation on the abolition of the lifetime allowance</a></p> <p>The abolition of the lifetime allowance was one of the proposed changes to the pensions' taxation regime announced in the Spring 2023 Budget. A phased approach has been adopted towards this abolition. The first phase took place in April 2023 with the Finance (No. 2) Act 2023 legislation that prevented individuals from becoming liable for the lifetime allowance charge from that point onwards. The second phase, which will be the abolition of the lifetime allowance itself, is scheduled for April 2024. Draft legislation has recently been published on this planned abolition, setting out how the Government will implement this.</p> <p>In this second phase, the proposals are for the lifetime allowance will be replaced by two new allowances:</p> <ul style="list-style-type: none"> <li>• The first, the individual's lump sum and death benefit allowance, will limit the total amount of lump sums and lump sum death benefits (but not pensions) which can be taken tax free by an individual to a maximum of £1,073,100; and</li> <li>• the second, the lump sum allowance, will be set at £268, 275 and provide a limit on the total value of tax-free cash which can be taken (as a result of a pension commencement lump sum, an uncrystallised funds pensions lump sum, a trivial commutation lump sum and a winding up lump sum).</li> </ul> <p>However, despite the introduction of these two new allowances, those individuals with lifetime allowance protection will effectively maintain the entitlements they had prior to the abolition of the lifetime allowance relating to tax free cash.</p> <p>In order to prepare for the implementation of this second phase, trustees should take steps to familiarise themselves with the proposed changes and consider what actions may be needed for their particular scheme. It may be the case that scheme rules and associated member communications will require updating in areas such as the recommencement of benefit accrual or where other benefit arrangements interplay with the lifetime allowance, such as cash in lieu of pension arrangements and excepted group life policies.</p>	<p>April 2023 and April 2024</p>	<p>Further information on this topic can be found in our briefing <a href="#">here.</a></p>
<p><a href="#">Trustee decision to wind up scheme's sponsoring employer approved by High Court</a></p> <p>In the case of <i>Brass Trustees Ltd v Goldstone</i>, the High Court approved the decision of the trustees to issue a petition to wind up the sponsors of a defined benefit</p>		<p>Further information on this topic can be found in our briefing <a href="#">here.</a></p>

<p>pension scheme. As at May 2023, the employers owed the scheme over £39.74 million.</p> <p>The employers had (broadly) not met their financial obligations to the scheme since March 2020. This included obligations under the schedule of contributions, obligations under an agreement to make exceptional contributions to the scheme and unpaid insurance and expense contributions.</p> <p>Under the rules of the scheme, the trustees could only wind up the scheme, without the principal employer's agreement, on employer insolvency.</p> <p>The High Court consented to the winding up of the sponsoring employers. The court was satisfied that the employers had no prospects of meeting their financial obligations to the scheme. The employers had also repeatedly failed to provide the trustee, the Pension Protection Fund or the Regulator with information either requested by the trustee or promised by the employer.</p> <p>The case emphasises that the court may support a trustee's request to ultimately force the winding up of a pension scheme by petitioning for the winding up of the employer. In particular, this may prove more likely in situations where sponsors have fallen behind with their financial obligations to the scheme in circumstances where there is no prospect of these employers meeting those obligations in the future. A lack of communication between the employer and trustee regarding the employer's financial position is another contributing factor to such actions.</p>		
<p><a href="#">Scheme amendment power prevents employer from making changes to active members' future benefits</a></p> <p>In <i>BBC v BBC Pension Trust Ltd &amp; Anor</i>, the BBC sought clarity as to the scope of the BBC Pension Scheme's amendment power and the ability to amend future pension accrual.</p> <p>The Scheme's amendment power allowed amendments to future benefits for active members if:</p> <ul style="list-style-type: none"> <li>• the scheme's actuary certified that the amendment would not "<i>substantially prejudice</i>" the members "<i>interests</i>"; and</li> <li>• if the change would substantially prejudice members' interests, the scheme's actuary confirmed that "<i>substantially equivalent benefits</i>" would be provided instead; or</li> <li>• if a majority of active scheme members vote for a change at an appropriately constituted meeting.</li> </ul>		<p>Further information on this topic can be found in our briefing <a href="#">here</a>.</p>

<p>The court found that, in the specific context of the scheme, the meaning of the word "<i>interests</i>" was very wide so as to include, for example, future pensions accrual. This means that, other than in very limited circumstances such as where members' interests were not "<i>substantially prejudiced</i>", it will be very difficult for the BBC to make changes to active members' future service benefits using the scheme's amendment power.</p> <p>The BBC has been granted permission to appeal on all the grounds on which it lost at first instance. We expect the appeal to be heard in the next 12 months. Stephenson Harwood's pensions disputes team acted for the Representative Beneficiary.</p>		
<p><a href="#">In specie contributions to a SIPP do not receive tax relief - Killik &amp; Co LLP v HMRC</a></p> <p>Historically, it has been common for contributions into a SIPP to be made in specie by way of contributions of shares or other non-cash assets, on the understanding that such contributions would constitute 'pension contributions paid' for the purposes of Section 188 of the Finance Act 2004 (<b>FA04</b>), and consequently that tax relief could be claimed in respect of such contributions. Additionally, HMRC guidance that has been in place since 2009 states that in specie contributions structured as a payment in satisfaction of a debt to a SIPP would also constitute 'pension contributions paid' for the purposes of Section 188 FA04.</p> <p>This position was upended by the Upper Tax Tribunal decision in Sippchoice 2, which held that such in specie contributions and contributions as payments in kind did not constitute 'pension contributions paid' for the purposes of tax relief under Section 188 FA04.</p> <p>The present case confirms the decision in Sippchoice 2, that payments in kind are not 'pension contributions paid'. As in Sippchoice 2, HMRC had refused an application for relief under Section 188 FA04 in respect of in specie contributions structured as a payment in satisfaction of a debt owed to the SIPP.</p> <p>There is potential for the case to be appealed and so it is worth following any further developments related to this decision. In the meantime, it remains inadvisable to make in specie contributions into a SIPP, given the considerable risk that tax relief will not be able to be claimed in respect of such contributions.</p>		<p>Further information on this topic can be found in our briefing <a href="#">here</a>.</p>

<p>Ombudsman confirms scope of employer's, trustees' and scheme administrator's duties regarding warning members of personal tax implications</p> <p>The Pension Ombudsman's determination in the case of Mr Y has reiterated that a sponsoring employer's, trustees' and scheme administrator's duties do not extend to warning members about personal tax implications as a result of options around the taking of benefits.</p>		<p>Further information on this topic can be found in our briefing <a href="#">here</a>.</p>
--	--	---



The Stephenson Harwood pensions law group is tier 1 and tier 2 in Legal 500 for pensions disputes and pensions advisory work. Please see the Legal 500 website [here](#) for more information.



## Contacts



PHILIP GOODCHILD  
**PARTNER, Pensions**

T: +44 20 7809 2166  
E: [Philip.Goodchild@shlegal.com](mailto:Philip.Goodchild@shlegal.com)



STEPHEN RICHARDS  
**PARTNER, Pensions**

T: +44 20 7809 2350  
E: [Stephen.Richards@shlegal.com](mailto:Stephen.Richards@shlegal.com)



JULIA WARD  
**SENIOR KNOWLEDGE LAWYER,  
Pensions**

T: +44 20 7809 2028  
E: [julia.ward@shlegal.com](mailto:julia.ward@shlegal.com)

This note does not constitute legal advice. Information contained in this document should not be applied to any particular set of facts without seeking legal advice. Please contact your usual Stephenson Harwood pensions law group member for more information.