ADVOCATES

Pensions: Investment Decisions: a possible shift in approach and undesirable consequences for SIPP providers in the Isle of Man?

Past Ombudsman determinations

The (then) Deputy Pensions Ombudsman in the Isle of Man (the "**Ombudsman**") has published several determinations, dating from 13 October 2018 to 20 October 2021, some of which consider the duties and responsibilities of pension scheme trustees and administrators in respect of **investments**. From our review of those determinations (dated during 2019), we have extracted the following key aspects:

- A claim against a pension scheme trustee for breach of its duties would likely be unsuccessful unless proven that the trustee itself made an investment decision, i.e. did not act on an execution only basis.
- In considering whether a trustee has breached its duties, the Ombudsman would take into account, amongst others, the following statutes/statutory provisions:
  (a) section 20 of the Retirement Benefits Schemes Act 2000, which states that any provision of a scheme document is void to the extent that it exempts a trustee from liability for failure to exercise due care and diligence;
  (b) the Misrepresentation and Unfair Contract Terms Act 1980, in respect of contractual exclusions;
  (c) unless exempt, Regulation 15 of the Retirement Benefit Schemes (Domestic Schemes) (General Administration) Regulations 2000, which requires trustees to obtain advice and maintain a written statement of investment principles; and
  (d) save as expressly excluded or limited, the Trustee Act 2001.
- Other factors which the Ombudsman would consider include agreed terms of business, terms and conditions of membership and specific disclaimers or indemnities in scheme documents.
- In respect of 'acceptable investments', the Ombudsman has noted that, even if a trustee is not under an express duty to maintain a list of permitted investments, a *de facto* list could exist based on past investment decisions.
- Trustees may owe a limited contractual duty to members to consider whether an investment is in line with stated investment strategies and, if not, ensure (in writing) that members are aware thereof.
- If an investment decision is made by a nominated investment advisor, a trustee would be expected to ensure that such advisor is aware of the member's stated investment strategy and to obtain that advisor's license number.

A possible shift in approach?

Notwithstanding the above, in the English case of ***Adams v Options UK Personal Pensions LLP*** (previously Carey UK Pensions LLP) ***(2021),*** which was appealed all the way up to the Supreme Court of Appeal (which refused permission to appeal in April 2022), the Court of Appeal held (which judgment is final and binding) that under section 27 of the Financial Services and Markets Act 2000 ("**FSMA**"), the agreement between the SIPP provider **("Carey")** and the member ("**Mr Adams**") was unenforceable and Mr Adams was entitled to consequential relief from Carey (the "**Claim**").

In a supplemental judgment handed down on 20 July 2021, the Court stated that the consequential relief should be as such to put Mr Adams in the position he would have been in had he not transferred his pension fund to Carey. Ultimately, Carey was ordered to:
  (a) pay into Mr Adam's fund the amount which had been transferred to Carey, less any amounts Mr Adams had received and plus (i) the growth Mr Adams would have received

had he not transferred his fund and (ii) the proceeds of sale of the storage pods which had been invested in; and

(b) pay Mr Adam's costs on an indemnity basis.

The Claim was made on the basis that the agreement between Mr Adams and Carey was entered into in consequence of an off-shore, unregulated introducer, in contravention of the general prohibition in section 19 of the FSMA. The Court of Appeal found that convincing Mr Adams to transfer his pension fund to Carey, (which would then allow him to invest in the relevant unregulated, high risk investment), and completing the relevant application form to do so, amounted to 'advising on investments' and 'arranging deals in investments', as contemplated by articles 53 and 25 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, respectively.

Consequences for SIPP providers in the Isle of Man?

Although it would depend on the facts of each case, and despite the Carey case being determined by the Court in England, it is highly likely that if a similar matter came before the Isle of Man Court or the Ombudsman today, the outcome would be heavily persuaded by the Carey case and an 'execution only' basis argument in relation to investments may no longer hold up.

In dealing with third party introducers in the future, the following legislative provisions (equivalent to those noted above in the Carey case in the UK), may therefore become relevant, namely:

- section 28 of the Financial Services Act 2008 ("**FSA 2008**") (Agreements made through unlicensed, etc persons);
- the general prohibition in section 4 of the FSA 2008; and
- the Class 2 Regulated Activities set out in subsections (7) (advising on investments) and (3) (arranging deals in investments) of the Regulated Activities Order 2011.

It should however be noted that in terms of section 29 of the FSA 2008, the Court has a discretion whether to allow an agreement to proceed despite its unenforceability under section 28 of the FSA 2008 (this discretion was however not exercised in the Carey case).

If you would like further information on this subject please contact Annemarie Hughes or Rachel Winterbach.

Rachel Winterbach

Disclaimer

The information and/or opinions contained in this article is necessarily brief and general in nature and does not constitute legal or taxation advice. Appropriate legal or other professional advice should be sought for any specific matter. Any reliance on such information and/or opinions is therefore solely at the user's own risk and DQ Advocates Limited (and its associates and subsidiaries) is not responsible for, and does not accept any responsibility or liability in connection with any action taken or reliance placed upon such content.