

Legal Update Institute of Actuaries

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13 November 2019

Agenda



- The Pension Schemes Bill
- The Safeway Pension Scheme Litigation
- The Burgess v BIC UK Ltd Litigation

Pension Schemes Bill



The Pension Schemes Bill

Background



- The Defined Benefit (“DB”) White Paper
- The Bill
 - **Collective Defined Contribution Schemes** (legislative and regulatory framework)
 - Enhanced **Pensions Regulator’s Powers**
 - Pension Dashboards Services (“PDS”)
 - New DB Scheme Funding Measures
 - Pension Transfers (a revision of the rules)
 - Pension Protection Fund compensation



The Pension Schemes Bill

Collective Defined Contribution (“CDC”) Schemes

- What is a CDC Scheme?
- Government consultation
- Points of detail
 - Authorisation from The Pensions Regulator (“tPR”)
 - TPR ongoing supervision:
 - Regular supervisory returns
 - Obligation to notify tPR of “significant events”
 - Very similar to the Master Trusts regime
 - Pension Schemes Act 2015 framework will be repealed

The Pension Schemes Bill

The Pensions Regulator's Power



Contribution Notices

- ❑ **Employer insolvency test** – material reduction in the likelihood of recovering a section 75 debt
 - **Test:** (1) scheme in deficit at the material time AND (2) act or omission would have materially reduced the amount of debt likely to be recovered by the scheme
 - **Defences:**
 1. due consideration given to the potential reduction AND reasonable to conclude act or omission would not have material reduction AND (where applicable) reasonable steps taken to eliminate or minimise effect
 2. immediately after the act or omission there was no actual deficit
- ❑ **Employer resources test** – material reduction in employer covenant / ability to pay section 75 debt
 - **Test:** (1) act or omission reduced the value of the employer's resources AND (2) reduction was material relative to the amount of the employer debt
 - **Defence:** due consideration given to the potential reduction AND reasonable to conclude act or omission would not have material reduction AND (where applicable) reasonable steps taken to eliminate or minimise effect
- ❑ **Reasonableness test**
 - The effect of the act or omission on the value of the scheme's assets or liabilities
 - Non-compliance with new requirements to provide information



The Pension Schemes Bill

The Pensions Regulator's Powers

Power to obtain information

- Interview summons
- Inspection of premises – expanded powers
- Non-compliance:
 - fixed penalties (up to £50,000);
 - escalating penalties (up to £10,000 a day)*

Notifiable events framework

- Changes to existing framework
- Additional reporting duties
- Non-compliance:
 - TPR penalty (up to £1 million); OR
 - existing criminal fine and/or prison for up to 2 years



The Pension Schemes Bill

The Pensions Regulator's Powers



New and updated tPR financial penalties

- Up to £1 million
- New penalty for **knowingly or recklessly providing false or misleading information to tPR, trustees, or managers** – max tPR penalty £1 million

New criminal offences and sanctions

- **Failing to comply with a contribution notice** – max tPR penalty £1 million OR criminal fine
- **Avoidance of employer debt** – max tPR penalty £1 million OR criminal fine and/or prison for up to 7 years
- **Conduct risking accrued benefits** - max tPR penalty £1 million OR criminal fine and/or prison for up to 7 years

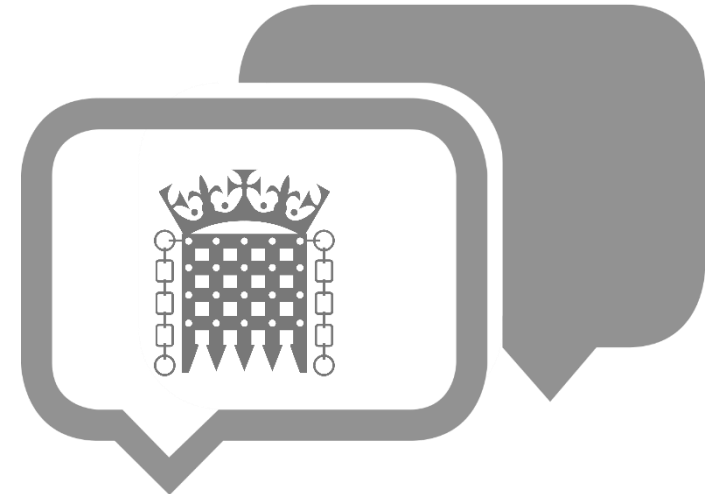


The Pension Schemes Bill

Commentary



- What's not in The Pensions Bill?
 - Superfunds framework
 - GMP conversion
 - Details to be provided by subsequent regulations, for example:
 - CDC “significant events”
 - PDS requirements and obligations to provide information
 - New information requirements for transfers
- Effective dates / consultations
- General election?



*Safeway Ltd v Andrew
Richard Newton and
Safeway Pension
Trustees Ltd*



Safeway Ltd

Background



- Equalisation – 30 years on from *Barber*
- Timeline

1984	<ul style="list-style-type: none">• Safeway Pension Scheme was established• Normal Pension Age (“<u>NPA</u>”) of 60 for women and 65 for men
17 May 1990	<i>Barber 1990</i> – ECJ rules that the fixing of NPA by gender constituted discrimination
1 September 1991	Safeway issues a member announcement - NPA will be 65 for all members (with effect from 1 December 1991)
1 December 1991	Further member announcement issued to confirm the change to NPA
2 May 1996	<ul style="list-style-type: none">• Deed of Amendment wholly supersedes the 1984 Trust Deed and Rules• Fixes the NPA at 65 for all members with backdated effect to 1 December 1991

Safeway Ltd

Background



Rule 19 – 1984 Trust Deed and Rules (Amendment Power)

*"The Principal Company may ...with the consent of the Trustees **by Supplemental Deed executed by the Principal Company and the Trustees** alter or add to any of the trusts powers and provisions of the Scheme ... and may exercise such powers so as to **take effect from a date specified in the Supplemental Deed which may be the date of such Deed or the date of any prior written announcement to Members of the alteration or addition or a date occurring at any reasonable time previous or subsequent to the date of such Deed so as to give the amendment or addition retrospective or future effects as the case may be.**"*

Safeway Ltd



The question before the High Court

- 1) When was the Safeway Scheme's NPA equalised?
 - A. On 1 December 1991 - in line with the written announcement and the purported backdated effect of the Deed of Amendment
 - OR
 - B. On 2 May 1996 - when the Deed of Amendment was executed

- 2) Was it possible to retrospectively 'level down' member's benefits during the *Barber* window?

Safeway Ltd

The High Court's Decision



- 1) Option B – NPA was not equalised until 2 May 1996
 - The amendment power required amendments to be made by deed, the required deed was not executed until 1996

- 2) EU law prohibited retrospective levelling down
 - The purported retrospective effect of the was not effective



Safeway Ltd

The Court of Appeal



Safeway appealed both points of law

- Appeal dismissed in part – a deed was required to make the amendment
- Referral to the ECJ – could equalisation be achieved by ‘levelling down’?



Safeway Ltd

The AG and ECJ decision



Attorney General's Opinion

- Reformulated the question
- It was immaterial whether women had a 'defeasible' or 'indefeasible' right to retire at 60
- Retrospective 'levelling down' was prohibited regardless of the rules of the scheme

ECJ's Decision

- Article 119, precluded retrospective 'levelling down' (unless objectively justifiable)



Safeway Ltd

Case Commentary



- What happens next?
- Can Safeway objectively justify the change?
- Exceptional circumstances? *Smith v Avdel*



Burgess v BIC UK Ltd

simmons
simmons



Burgess v BIC

Background



- Formalities – do we really need to endure all of this procedure?
- Pensions increases - £5.06 million
- Timeline

October 1977	<ul style="list-style-type: none">• Fourth Edition rules were adopted by a Deed of Variation• No general right to pension increases
1991	Resolution to use Scheme's surplus to grant additional pension increases
March 1992	Members notified of the increases
April 1992	Pensions increases applied
1993	<ul style="list-style-type: none">• Rules revision purports to backdate effect to August 1990• Introduced a power to increase pensions in payment (did not cover pensionable service prior to April 1997)
March 2013	Pre-1997 increases were suspended

Burgess v BIC

Background

Fourth Edition of the Rules – 1977

- Rule 36

*“... the Trustees may from time to time and at any time with the consent of the Principal Company [i.e. BIC UK] by way of formal variation of these Rules **adopted by any deed or deeds executed by the Trustees and the Principal Company or by any writing effected under hand by the Trustees and the Principal Company** alter or modify all or any of the provisions of the Scheme...”*

- No alteration or modification of the Fourth Edition should be made ...

“which would have the effect of varying or affecting any benefits ... without the consent in writing of any member affected thereby.”

Burgess v BIC

Background

1993 Deed and Rules

- Expressly stated to substitute the Second Definitive Deed and the existing rules (which included the Fourth Edition rules) with effect from 6 August 1990.
- Clause 4 - Amendment of Trust Deed / Rules

“The Trustees may at any time ... with the consent of the Principal Employer ... by resolution (in writing) of the Trustees in the case of the Rules only modify alter or extend all or any of the trusts, powers or provisions of this deed or the Rule [with retrospective effect]”

Burgess v BIC

The legal question before the Court

Agreed position

The pension increases had not been validly introduced in 1991 in accordance with the trust deed and rules in place in 1991 (Fourth Edition).

Question at hand

- 1) Could the purported backdating of the 1993 Rules 'fix' the failure to introduce the pension increases with the correct formalities in 1991?
- 2) If the backdating was effective, had the pension increases been validly introduced?

Burgess v BIC

The High Court



Court's Decision

- The pre-1997 increases were validly granted under the 1993 Deed

Obiter

- Under the Fourth Edition rules (Rule 36), the increases would have been valid if the meeting minutes had been signed by all three of the Trustees, and on behalf of BIC UK.
- Equity could not rectify the failure – discretionary power

Burgess v BIC

The Court of Appeal

- The pension increases were invalid
 - Lack of intention
 - Rewrote history to an impermissible extent



Burgess v BIC

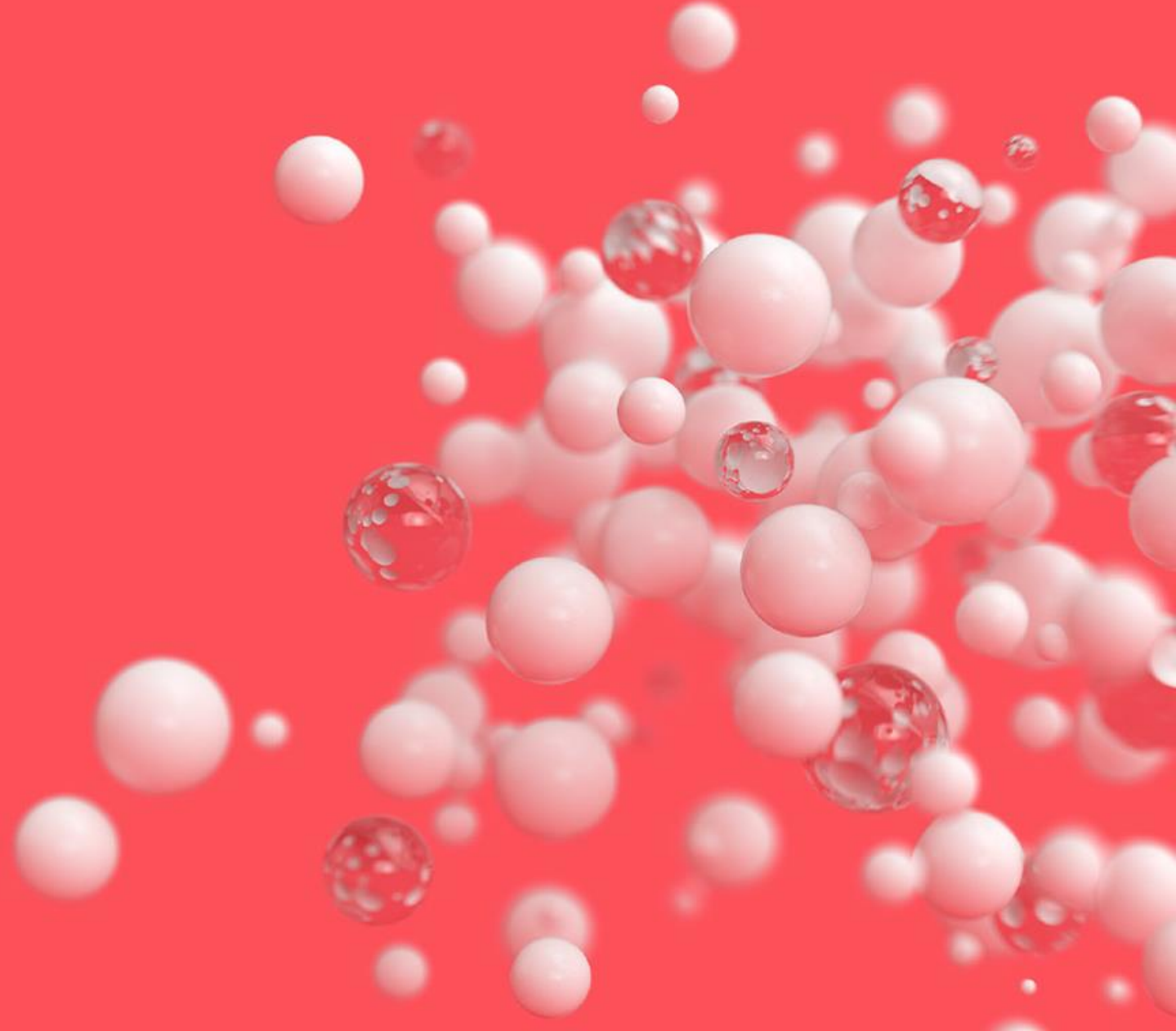
Case Commentary

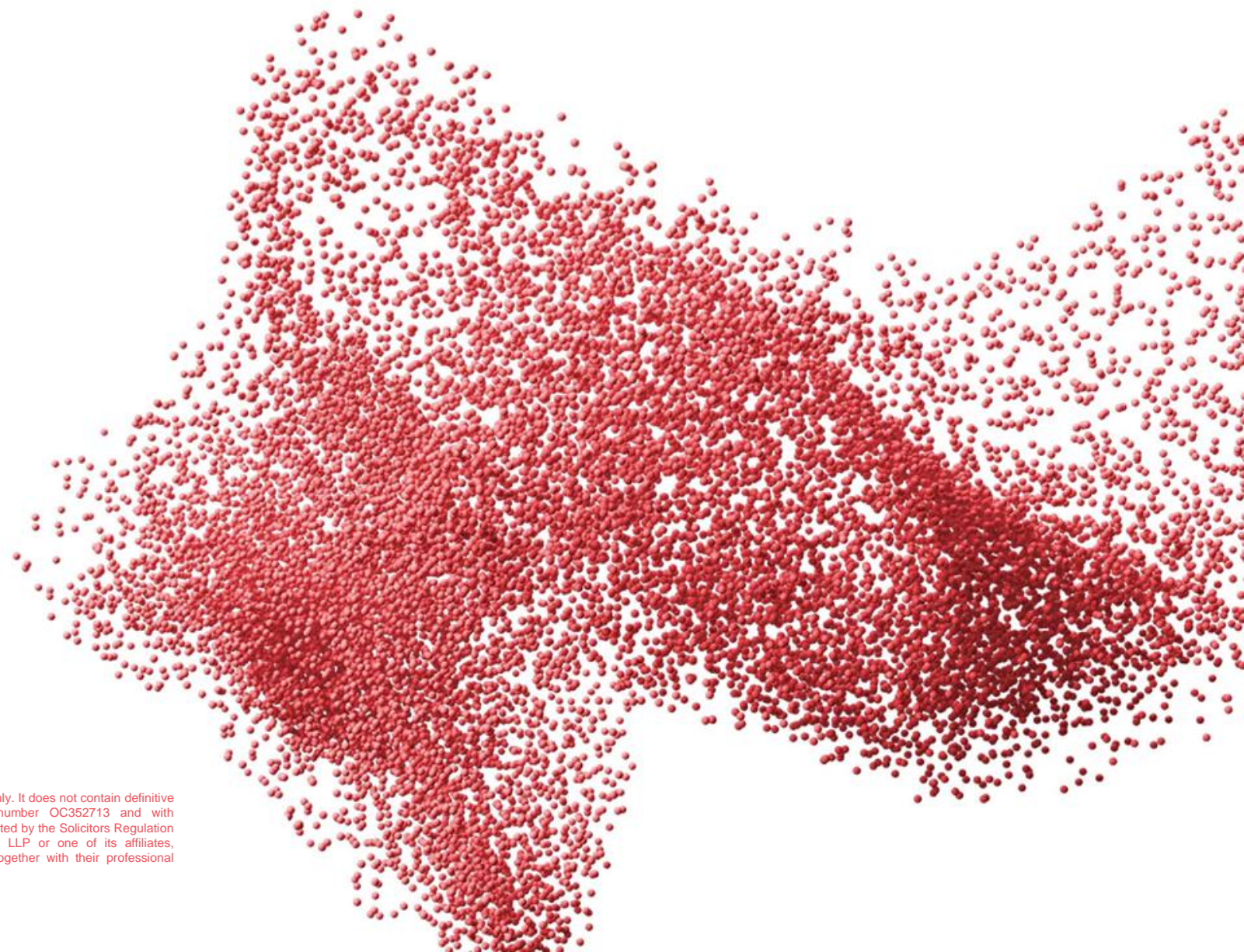


- How you do something – more than just style
- Common intention
- Equitable recoupment
- Arnold J on the Pensions Ombudsman as a competent court



Any questions?





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