

Pensive about pensions

Sally Ramage looks at the criminal offence of fraudulent evasion and how it relates to pension schemes – plus the plans to protect funds from misappropriation



Employer-based or 'occupational' pension schemes are a significant part of UK pensions, with an estimated £776 billion in assets and 10-11 million employees as active participants, according to the Select Committee on Work and Pensions.

Auditors of banks, insurance companies and charities have a duty to make reports to regulators. The Pensions Act 1995 established important responsibilities for pension scheme auditors. The Auditing Practices Board has established principles and set standards for the profession through the Statement of Auditing Standards 620, *The Auditor's Right and Duty to Report to Regulators in the Financial Sector*.

The principal determinant of the duty to report is whether a breach is likely to be of material significance to the regulator (level of materiality).

The Statement of Auditing Standards 620 states: "The term 'material significance' requires interpretation in the context of the specific legislation applicable to the regulated entity. A matter or group of matters is normally of material significance to a regulator's functions when, due either to its nature or its potential financial impact, it is likely of itself to require investigation by the regulator." So, essentially, this is a matter of judgement for the auditor.

Cases in point

The first ever prosecution for the criminal offence of fraudulent evasion to be brought by the Occupational Pensions Regulatory Authority (OPRA) was the 2002 case against Peter Lavender, a director of SSL Patient Transport Systems Ltd, who used the company's occupational pensions to prop up

the failing company. His defence was that he was not aware that the pension contributions were not being paid over to the pension scheme. He claimed that it was the bank that had stopped the direct debits of contributions to the scheme because of a shortage of funds in the account, but in fact he had instructed the bank to stop these direct debits. He was found guilty of fraudulent evasion and was fined £1,000 and disqualified from being a director for four years.

But another pension scheme fraud case, *Woodland-Ferrari v UCL Group Retirement Benefits [2002]*, was decided against the pension scheme because it had made some breach-of-trust investments. Robert Woodland-Ferrari stated that he had been made bankrupt after the date of the breaches of trust and, given the fact that his bankruptcy had been discharged, he was no longer liable to make good the breaches of trust because he was released from all his bankruptcy debts on his discharge. The Pensions Ombudsman had decided that this was a 'wilful default', but since this was not the same as 'fraudulent breach of trust' as per the Insolvency Act, the judge decided that the demand had to be set aside.

Another important case was that of *Balfron Trustees v Peterson [2001]*, in which a firm of solicitors applied to the court to strike out claims that it was liable for the alleged wrongful acts of one of its employees. The claim arose in relation to the misappropriation of funds from a pension scheme. As a result of the misappropriation, the scheme had become underfunded.

A certain trustee of the scheme sought compensation because the solicitor had been

instructed to act for Balfron Trustees Ltd – a company whose sole valuable asset was its interest in the scheme – and the solicitor had drafted an agreement, part of a plan to use the assets of the pension scheme.

The court did not strike out the claim that this solicitor had knowingly assisted in breaches of trust.

Protection for pensions

A new Pensions Act was passed on 6 April 2005, which establishes a Pension Protection Fund to protect members of private sector defined-benefit schemes whose firms become insolvent with insufficient funds in their pension scheme, thus reassuring members that they will still receive most of the benefits they are expecting. It focuses on protecting the benefits of pension scheme members and will concentrate on those schemes where it is considered that there is a high risk of fraud, bad governance or poor administration.

The Fund has a Pensions Regulator with focus on under-funding, fraud and maladministration. It consists of a chairman and six other board members and has a committee of non-executive board members for specified functions, such as reviewing the strategic direction of the Regulator.

From 6 April 2005, the Regulator may exercise its power to freeze pension schemes while it investigates them. It is more powerful than its predecessor OPRA, which could only wind up a scheme or appoint an independent trustee. □

Sally Ramage BA (Hons), MBA, LL.M., MAAT, MCMi is an author and teaches compliance issues at the University of Wolverhampton