



# ACE Elite

## *Pension Trustee Liability – The facts*

In recent years, the number of duties and obligations placed on trustees has grown as a result of government intervention making the role of trustee more onerous than ever. Trustees who breach these increasingly complex responsibilities may place their personal assets at risk or, in certain circumstances, find themselves liable for civil and criminal penalties. This personal liability stays with a trustee to the grave and, arguably, beyond. Add to the mix a generally more litigious society, scheme members becoming more aware of their pension rights, adverse market conditions and the ever increasing profile of pensions in the news and it is easy to understand trustees' interest in the protections available to them and why there has been a call to make insurance mandatory.

### **Protections available to a trustee**

*Section 61 Trustees Act 1925* – A trustee who has been in breach of trust can try and make use of this, which allows the Court to excuse them as long as they have acted 'honestly and reasonably and ought fairly to be excused'.

*Exoneration and Indemnity Clauses* – Companies can help reduce the liability exposure of trustees by the incorporation of these clauses in trust deeds which generally operate to exclude liability arising out of a breach of fiduciary or other duty, provided it is innocent.

*Insurance* – An insurance policy is available which is designed to provide a means of protecting an individual's personal assets (usually a trustee but this can also include employees and directors and officers of the employer company). It also looks to reimburse the scheme fund and / or the principal or participating employers in respect of any loss resulting from exoneration and indemnification. In addition, the employer may also benefit from any cover available to them in the case of any direct claims.

### **Why should a trustee consider pension trustee liability insurance?**

*Section 61 Trustees Act 1925* – The problem with this protection is that it relies on the Court's opinion as to whether the trustee in question acted 'honestly and reasonably and ought fairly to be excused'. Moreover, if the trustee was in any doubt he perhaps should have made an application to the Court.

*Exoneration and Indemnity Clauses* – Sentiment has begun to swing against sole reliance upon these clauses as their successful operation usually entails a financial loss to the employer or the pension fund. It is

also difficult to ensure that the wording of these clauses includes every conceivable eventuality (for instance, liability for an investment breach cannot be excluded) and of course they depend on the continuity and financial stability of the pension scheme or sponsoring employer; something that cannot be taken for granted these days

*Subrogation* – Often trustees will look to subrogate to the third party to which they have outsourced. However, it is important to note that often these types of breaches typically have a lifespan of 6 years, whereas breaches of trust have no such limitation. As a result trustees can often be left holding the can for the historical mistakes of their advisors. There is also the added complication of where the professional in question limits their liability; a more regularly employed approach in this increasingly demanding environment.

*Directors and Officers' Insurance* – In the past, trustees may have felt they were afforded a level of protection through the company's directors and officers' insurance policy. Increasingly, however, protection for trustees and / or pensions is being specifically excluded under this type of cover.

*Defined Contribution Risk* – It may only be a matter of time before the focus of litigation follows the trend of pension arrangements, moving from defined benefit to defined contribution. For those employers and / or trustees who may have believed they were shifting the risk from themselves to members when moving from defined benefit to defined contribution, the claims of the future may just prove this assumption to be alarmingly inaccurate.



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### Who is covered?

A typical pension trustee liability policy should cover:

- ▶ Past, present and future trustees
- ▶ Employees
- ▶ The sponsoring employer company or pension scheme as a result of indemnification
- ▶ The pension scheme as a result of exoneration
- ▶ The sponsoring employer company or corporate trustee company for direct claims
- ▶ Lawful spouses, domestic or civil partners, estates, heirs or legal representatives of trustees or employees in the event of death, incapacity, insolvency or bankruptcy.

### What is covered?

A typical policy should cover:

- ▶ Breaches of trust
- ▶ Breaches of duty
- ▶ Breaches of statutory provision
- ▶ Negligence
- ▶ Errors and omissions
- ▶ Mis-statements and misleading statements
- ▶ Maladministration
- ▶ Legal representation expenses incurred by an investigation or proceeding by the Pensions Ombudsman, Pensions Regulator or equivalent body, although an allegation of a wrongful act may have to be made.

### Extent of policy wording

Policy wordings can differ dramatically between providers, so trustees need to identify the areas that are of particular importance and concern to them and ensure that these are addressed in any product finally purchased. A typical policy can be tailored using additional extensions, e.g.

there should be the option to provide cover for retired trustees, civil fines and penalties and theft, if applicable. The policy should also respond to changing circumstances including company and scheme mergers, consolidations, acquisitions and wind-ups.

It is a worthwhile exercise for trustees to request clarification on what the policy does and, perhaps more importantly, does not cover by way of added endorsements. These can drastically affect the cover available under the policy, both positively and negatively, and thus should be paid particular attention.

For trustees of UK pension schemes, it is important that the policy in question is written in plain English, including pension specific terminology, and responds to the most recent UK legislation.

Where a global policy is in place, trustees need to reassure themselves that this is appropriate. Consideration should be given to the differences in legislation and frequency of litigation that will exist between countries. Are the trustees confident that any US exposure will not eliminate their limit of liability in the unfortunate event of allegations being made at similar times? Is the policy wording sufficiently broad to cover the legislation and regulatory bodies of all the countries encompassed?

### Which provider is most appropriate?

Thus, when looking for an insurance provider to suit a trustee's needs, there are some key differentiators that should be considered in addition to price, including:

- ▶ The policy wording and coverage
- ▶ The underwriters' knowledge and understanding of pensions
- ▶ The insurer's claims department awareness and response; and
- ▶ The insurer's commitment to the product long-term.