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Core Unit 2 – Regulation of Retirement Provision

Assignment 2 Notes

(Part 2 – Trust Law, The Role of Trustees and Establishing a Trust-Based Pension Scheme)

Recommended Time: 1 Hour

1. Outline the main features of a trust and the features that make it well suited to occupational pension provision.

5 marks

Answer should cover:

The main features of a trust are:

- a separation between the legal owner of the trust property and the person or persons who have the benefit of it ;
- trustees must use the trust property in accordance with the purpose for which the trust was created, according to the terms of the trust;
- trust property is separate from both the trustees' private property and the property of the person who created the trust; and
- a trust can be enforced only by the beneficiaries unless the settlor specifically reserves the right to enforce the trust when it is created.

A trust is well suited for occupational pension provision because:

- the trustees must hold the scheme assets for the purpose of providing the members' benefits; and
- the assets are ring-fenced, which means that they are secure even if the sponsoring employer becomes insolvent.

(Relevant section of the manual is Part 2 Chapter 1.1)

2. Outline the "three certainties" that must be present to create a valid trust.

5 marks

Answer should cover:

The "three certainties" that must be present to create a valid trust are:

- Certainty of intention – i.e. the settlor must show a clear intention to create a trust.
- Certainty of subject matter – i.e. the trust property must be clearly identified or identifiable.
- Certainty of 'objects' – i.e. the beneficiaries of the trust and the benefits that they are to receive must be certain.

(Relevant section of the manual is Part 2 Chapter 1.4)

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3. Explain why, and in what circumstances, an independent trustee might be appointed to act in respect of an occupational pension scheme.

10 marks

Answer should cover:

The Pensions Regulator (TPR) may appoint an independent trustee under section 23 of the Pensions Act 1995, where, in relation to an occupational pension scheme:

- an insolvency practitioner is appointed in respect of an employer participating in the scheme; or
- the official receiver becomes the liquidator or provisional liquidator of a company which is a participating employer;
- the official receiver becomes the interim receiver of the property of a person who is a participating employer in relation to the scheme; or
- the official receiver becomes the receiver and the manager, or the trustee, of the estate of a bankrupt who is a participating employer in relation to a scheme.

For the purposes of section 23 of the Pensions Act 1995 a person is independent if he:

- has no interests in the assets of the employer(s) or the scheme otherwise than as a trustee;
- is neither connected with nor an associate of:
  - i) any of the employer(s) of the scheme;
  - ii) any person for the time being acting as an insolvency practitioner in relation to an employer; or
  - iii) the official receiver acting in any of the capacities mentioned above in respect of an employer.

TPR can only appoint a person as an independent trustee of a scheme under section 23 if that person is registered on the regulator's register of independent trustees.

Quite apart from TPR's power to appoint an independent trustee under section 23 of the Pensions Act 1995, many schemes choose to appoint an independent trustee. The reasons why a scheme may choose to appoint an independent trustee include:

- wanting to ensure that an independent voice is heard in all trustee decisions;
- wanting to add additional expertise to the trustee board; or
- as a means of managing conflicts of interest on the trustee board.

(Relevant section of the manual is Part 2 Chapter 2.1.6)

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4. Outline the extent of trustees potential liability.

5 marks

Answer should cover:

A trustee can be held personally liable to the full extent of his personal assets for:

- failing to act with reasonable care and prudence or not acting in good faith;
- losses to the trust fund which result from a breach of trust; and
- the acts of his co-trustees if he has not exercised due care in ensuring that they have properly discharged their duties.

A trustee is liable for acts or omissions which occur during his term of office.

Where more than one trustee is liable for a breach of trust, liability is joint and several. 'Joint and several liability' means that a beneficiary can claim the complete loss from any one trustee separately or all or several of them jointly.

(Relevant section of the manual is Part 2 Chapter 2.17.1)

5. A new trustee of your scheme has asked you by e-mail what she must do to comply with the Trustee Knowledge and Understanding (TKU) requirement? Draft a response to her explaining what the TKU requirement is and outlining what steps she should take in order to comply with it.

10 marks

Answer should cover:

The Trustee Knowledge and Understanding requirement under the Pensions Act 2004 requires trustees to have knowledge and understanding of:

- the law relating to pensions and trusts; and
- the principles relating to the funding of occupational pension schemes and the investment of scheme assets.

Trustees must also be conversant with their scheme's:

- trust deed and rules;
- statement of investment principles;
- statement of funding principles; and
- any other documents relating to the administration of the scheme.

In order to achieve this trustees should:

- undertake regular training;
- keep a record of the training they receive; and
- review their scheme's governing documentation.

(Relevant section of the manual is Part 2 Chapter 2.9.)

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6. Describe the various ways in which trustees commonly protect themselves against potential liability.

10 marks

Answer should cover:

Trustees commonly protect themselves against potential liability in the following ways:

- by use of an exoneration clause **-** An exoneration clause seeks to exclude the trustees from liability.
- by use of an indemnity - an indemnity allows the trustees to recover any loss which they suffer as a result of a successful claim against them or in respect of costs incurred in defending a claim.
- under Section 61 of the Trustee Act 1925 - the court has a discretion to relieve a trustee of liability for a breach of trust if it believes the trustee acted honestly and reasonably and, in the circumstances, ought fairly to be excused.
- by taking out insurance - Trustees can take out insurance to cover themselves against personal liability.
- by establishing a corporate trustee - the individual directors of a corporate trustee have the benefit of greater protection from liability.

(Relevant section of the manual is Part 2 Chapter 2.17.2)

7. Outline the main features of the registration process for a pension scheme to be registered with HMRC.

5 marks

Answer should cover:

The “Scheme Administrator” must register with HMRC as a user of its Pension Schemes Online Service.

Once the Scheme Administrator is registered they then apply online to register the scheme making a declaration that:

- the scheme meets the Finance Act 2004 criteria for a pension scheme;
- the information on the form is correct;
- the scheme documents do not entitle any person to unauthorised payments; and
- the Scheme Administrator is a fit and proper person.

(Relevant section of the manual is Part 2 Chapter 3.2)