

SURPLUS TO WHOM DOES IT BELONG?

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Ownership of Surplus – the Great Debate

- The application of surplus whilst a fund is on-going or on winding up determined by provisions in its constitutive documents
- Sponsors of DB funds who have a balance of cost obligation expect to have control over and to participate in surplus distributions
- Equally, members feel that surplus is attributable to the returns on their contributions and that they are entitled to a share of surplus
- Issues typically arise if there are deficiencies in documentation
- Some guidance has been provided by case law which has confirmed the applicability of trust law to pension funds

Brief Summary of Jamaican Case Law

- Air Jamaica et al v. Joy Charlton et al
 - The applicability of trust law
- Vivion Scully et al v Gerald Coley et al
 - Who is a member
- UC Rusal Alumina Jamaica Ltd et al v Wynette Miller et al
 - Applicability of maximum pensions provision under the Income Tax Act

Section 32

Pensions (Superannuation Funds and Retirement Schemes) Act

- Trustees obliged to submit scheme of distribution of surplus for approval of the FSC
- FSC may amend scheme after consultation with trustees
- Section 32 (5) provides that in approving a scheme of distribution the FSC shall have regard to the order of priority stated

Section 32

Pensions (Superannuation Funds and Retirement Schemes) Act

- Section 32
 - does not state how surplus is to be distributed but sets out the order of priority
 - does not reserve to the FSC the discretion to determine the beneficiaries of surplus
- Potential for litigation
 - reliance often placed on this section in winding-up rules to determine entitlement
 - a resulting trust may be triggered

Issues Likely to Arise

- Interpretation of section 32
- The ability of the FSC to amend a scheme of distribution of surplus to exclude or include stakeholders
- Resulting trust when provisions on winding up not exhaustive of surplus
- Entitlement of annuitants and former members who have no interest in a fund on discontinuance
- Consideration of surplus on sale or purchase of business

Lessons Learnt

- Constitutive documents to be reviewed to ensure that:
 - whilst the fund is on-going, or as the case may be
 - prior to partial or total discontinuancethe provisions relating to surplus are clear and definitive of the interests of the relevant stakeholders
- If not, trustees/sponsor to be advised to amend relevant provisions
- Power of amendment must be wide enough to permit desired amendments

Lessons Learnt (Cont'd)

- If power of amendment does not permit payment of surplus to sponsor consideration would have to be given to strategies for unlocking surplus:
 - Taking contributions holiday
 - Addition of DC section to DB plan
 - Application to court for declaration on the applicability of the rule in *Saunders v Vautier* to permit consensual arrangements
- As options limited I would encourage my colleagues to lobby for the amendment of pensions legislation in Phase II to empower regulators to do surplus deals