

## **Pensions Crimes and Fines and Insolvency Practitioners: The impact of the Supreme Court decision in *R (Palmer)***

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### **Introduction**

Under pensions legislation, insolvency practitioners (**IPs**) are potentially guilty of a crime (or incur a civil penalty) where they are involved in the relevant crime (or penalty action) committed by the company over which they are appointed. In common with much other legislation, the ‘crimes and fines’ provisions in the pensions legislation contain an extension allowing a secondary party – a “director, manager, secretary or other similar officer of the body corporate” – to be guilty of the same offence as the company (or also liable for a penalty) in some circumstances, usually involving consent, connivance or neglect by the secondary party. This article looks at the position of IPs under the pensions crimes and fines following the recent decision of the Supreme Court in *R (Palmer)*: [R \(on the application of Palmer\) v Northern Derbyshire Magistrates’ Court \[2023\] UKSC 38, \[2024\] ICR 288](#).

### ***R (Palmer)***

The Supreme Court unanimously held that an administrator (appointed to a company under the Insolvency Act 1986) was not a “similar officer of the body corporate” and so did not fall within the secondary class and could not be prosecuted under the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA 1992**), s 194 for the (alleged) failure of the company to give notice to the Secretary of State of proposed collective redundancies. The primary offence is in s 194(1), with s 194(3) providing for the secondary offence in the following terms:

*Where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.*

This article considers how far the decision in *R (Palmer)* affects the position in relation to the various crimes and fines in the pensions legislation, in particular whether IPs can rely on the decision in *R(Palmer)* to assume they have no potential for committing a crime or incur a fine under the similar secondary provisions in the pensions legislation where they are appointed over a company.

### **Pensions crimes and fines and secondary parties**

Pensions legislation contains increasing numbers of criminal, financial penalty and civil penalty provisions. To date, these have been seemingly little used (aside from the auto-enrolment penalty provisions), but they have potentially wide effect. The Appendix to this article gives an outline of the pensions crimes and fines regime.

The primary target is usually a trustee or employer who fails to comply with some requirement. But where the relevant target is a company, the pensions legislation, in common with much other legislation<sup>1</sup>, also usually provides that a secondary class of persons - a “*director, manager, secretary or other similar officer of the body corporate*” - can also be guilty of the offence (or incur a penalty). This secondary liability is usually subject to some other conditions, in particular that the relevant offence/penalty was incurred by the relevant offending company<sup>2</sup> due to the consent, connivance or (in most cases) neglect of the secondary party.

There seems to be no requirement in these types of secondary offences for the offending company actually to have been convicted of the relevant offence<sup>3</sup>, but it will be necessary to show

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<sup>1</sup> The Law Commission commented in its 2022 paper ‘*Corporate Criminal Liability: an options paper*’ (10 June 2022) that there seemed to be well over a thousand legislative instruments creating criminal liability on this basis.

<sup>2</sup> I use the term “offending company” to refer to the primary body corporate target. The secondary parties listed must be within the relevant class and “of the body corporate”, meaning of the offending company.

<sup>3</sup> *R v Dickson* (1992) 94 Cr App R 7, [1991] BCC 719 per Leggatt LJ at 722G (a case relating to convictions for supplying goods to which a false trade description was applied); and in Ireland: *DPP v Hegarty* [2011] IESC 32, [2011] 4 IR 635.

that the company has committed the offence. It seems likely that the same analysis will apply to pensions criminal offences and to civil and financial penalties.

This note focuses on the phrase defining the class at risk. This looks quite simple, “*director, manager, secretary or other similar officer of the body corporate*”, but its interpretation is complex. Who is a “manager”? Who is a “similar officer”?

This is an important area for secondary parties. They may well not be able to shelter behind the corporate nature of the offending company. It is easy to surmise that the intention of Parliament is to catch potential secondary parties, particularly where the offending company is insolvent and so cannot meet the relevant fine or penalty.

The issue arises, in particular, for IPs, in practice mainly liquidators or administrators<sup>4</sup>, who, on appointment, tend to take control of the company to the exclusion of its directors (save in some limited respects). If at the time of appointment the company is already committing or starts later to potentially commit an offence (or incur a penalty), can the IP end up as a secondary party also committing an offence (or incurring a penalty)? This is likely to be a serious issue for the IP, particularly if the company continues to trade. Although a successful prosecution (or fine) would still require the further elements to be shown on the part of the IP – e.g. consent, connivance or (usually) neglect.

This potential for a criminal offence (or penalty) on the IP personally would add a significant complication to the IP’s decisions – for example whether or not to continue to operate the company’s business - if this could give rise to a potential personal liability on the IP. This is to be compared with a triggering of a money claim (for a fine or penalty) against the company itself – which from the IP’s perspective may impact the company and the recovery by creditors in the insolvency, but could rank as an unsecured debt (or might in some cases be preferential) or could in some cases be an insolvency expense<sup>5</sup> (and so be usually payable in advance of most other claims on the company).

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<sup>4</sup> Administrative receivers must also be IPs, but from September 2003 appointments have been restricted by the Enterprise Act 2002, broadly to appointments under charges created before 15 September 2003 or in certain capital market arrangements (see Insolvency Act 1986 (**IA 1986**), ss 72A to 72H).

<sup>5</sup> Claims against a company under a pensions moral hazard order for a contribution notice (**CN**) or financial support direction (**FSD**) under the Pensions Act 2004 (**PA 2004**) are unlikely to be an insolvency expense, at least where the relevant order is based on pre-insolvency facts: see *Re Nortel GmbH* [2013] UKSC 52, [2014] AC 209; and Pollard ‘*Corporate Insolvency: Employment and Pension Rights*’ (7<sup>th</sup> edn, 2022, Bloomsbury Professional) at ch 36 (Categorising claims: *Re Nortel*).

## IP express exemptions

IPs do have some express exemptions<sup>6</sup> from the moral hazard provisions in PA 2004, and from some (but not all) the primary crimes and fines in the pensions legislation. However these exemptions are from the primary liability and do not expressly exclude IPs from any potential secondary liability, where the primary liability falls on a company.

A table with some of the more important pensions provisions, and whether they have an express IP exemption, is below:

Provision	IP exemption?
<b>Moral hazard powers (CNs and FSDs)</b>	
FSD: PA 2004, s 43	No (but not needed as FSD cannot apply to an individual, if a corporate employer)
CN: PA 2004, s 38	Yes Exemption only if the Pensions Regulator (TPR) is of the opinion that IP is acting in accordance with his or her functions
Enforcement CN (re FSD): PA 2004, s 45	No (but not needed as can only apply to the target of an FSD)
<b>Crimes</b>	
PA 2004, s 40A: Failing to comply with a s 38 CN <sup>7</sup>	No express exclusion
PA 2004, s 58A: Avoidance of employer debt	Yes
PA 2004, s 58B: Conduct risking scheme benefits	Yes
PA 2004, s 80: providing false or misleading information to TPR	No
Pensions Act 1995 (PA 1995), s 49(8) and (11) and	No

<sup>6</sup> See *Corporate Insolvency: Employment and Pension Rights* at ch 20 (IPs and Pensions Liability).

<sup>7</sup> Note not an FSD enforcement CN under PA 2004, s 47.

<b>Provision</b>	<b>IP exemption?</b>
Pension Schemes Act 1993 ( <b>PSA 1993</b> ), s 111A: knowingly to be concerned in the fraudulent evasion of the obligation on an employer to pay contributions within a period after deduction from pay <sup>8</sup>	
Pensions Act 2008 ( <b>PA 2008</b> ), s 45: deliberate failure to comply with AE requirements	No but AE duties broadly cease if relevant scheme enters a PPF assessment period (PA 2008, s 31)
<b>Financial Penalties – PA 2004, s 88A</b>	
PA 2004, s 40B: Failing to comply with a s 38 CN <sup>9</sup>	No express exclusion
PA 2004, s 58C: Avoidance of employer debt	Yes Exemption only if TPR is of the opinion that IP is acting in accordance with his or her functions
PA 2004, s 58D: Conduct risking scheme benefits	Yes Exemption only if TPR is of the opinion that IP is acting in accordance with his or her functions
PA 2004, s 80A: providing false or misleading information to TPR	No
PA 2004, s 80B: providing false or misleading information to trustees	No Specified provisions within the sanction include PA 1995, s 26 (IP to give information to trustees)
PA 2004, s 69/69A: failure to notify TPR	No

<sup>8</sup> PA 1995, s 49(8): Contributions deducted from pay must be paid to the scheme within 19 days (22 days if paid by electronic communication) of the end of the month in which they are deducted: reg 16 of the Occupational Pension Schemes (Scheme Administration) Regulations 1996 (SI 1996/1715). An employer failing to pay members' contributions within the prescribed time may be subject to a civil penalty under PA 1995, s 10 – PA 1995, s 49(9)(a).

<sup>9</sup> NB not an FSD enforcement CN under PA 2004, s 47.

**Does the decision in *R (Palmer)* mean that IPs do not now have to worry about secondary crimes or fines under the pensions legislation?**

Broadly the answer is probably a qualified yes. Strictly the decision of the Supreme Court in *R (Palmer)* is only a binding authority in relation to cases where both:

- (a) the potential offences are under the collective redundancy provisions in TULRCA 1992, s 194(3); and
- (b) the IPs concerned are administrators.

These two issues are discussed further below.

**Application to other legislation?**

In relation to (a), strictly the decision in *R(Palmer)* was only dealing with interpretation of the secondary class language in TULRCA 1992. There is commentary in the caselaw that there is “danger” in construing words in one statute by reference to a decision on similar words in another statute<sup>10</sup>. But decisions on other statutes can be considered where they are “instructive by analogy” and can be “strongly supportive”<sup>11</sup>.

In practice where there is such statutory wording dealing with a secondary criminal liability and it has been construed (as in *R (Palmer)*) in a very similar context in relation to another statute, it seems likely that it will be very difficult to distinguish the result.

Conceivably the result in a case construing the secondary criminal (and penalty provisions) in another statute, for example the pensions legislation, could differ from that in *R (Palmer)*, but some fairly compelling distinguishing factor is likely to be needed. It seems much more likely that courts will consider that secondary criminal (and civil penalty) liability provisions with the same (or similar) wording to that in TULRCA 1992 are all intended to be penal and should have the same meaning.

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<sup>10</sup> See e.g. *Hastie & Jenkinson v McMahon* [1991] 1 All ER 255, CA per Woolf LJ at p261g: “There is always danger in seeking to apply decisions on specific statutory provisions to different situations....”; and *Stephens v Cuckfield RDC* [1960] 2 All ER 716, CA per Upjohn LJ at p719G: “Authorities on rather similar words in other Acts passed for entirely different purposes ... do not assist us.”

<sup>11</sup> Lord Lloyd-Jones in *R (KBR Inc) v SFO* [2021] UKSC 35, [2022] AC 519 at [46] and [53].



## Application to other IPs?

*R (Palmer)* is a decision in relation to administrators appointed under IA 1986. The decision needs to be examined in some detail in order to decide whether a similar result should apply to a different IP, for example a court-appointed liquidator, a voluntary liquidator or an administrative receiver.

All three categories have similarities with administrators – for example, they take over control of the company in place of its directors<sup>12</sup> and they need to be licensed IPs<sup>13</sup>. But there are differences: administrators are officers of the court<sup>14</sup>, as are court-appointed liquidators; but voluntary liquidators and administrative receivers are not. Administrators and administrative receivers have many similar powers<sup>15</sup>, including that they can arrange for the company to continue to trade. Liquidators have different powers and their power to arrange for a company to continue to trade is much more limited.<sup>16</sup>

Lord Richards, who gave the only judgment in *R (Palmer)*, considered that it was appropriate in relation to administrators to follow an earlier (unreserved) Court of Appeal decision, *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634, to the effect that receivers are not “officers of the company” for the purposes of the then Companies Act 1948, s 333. He held that this was appropriate on the basis that administrators were much more similar to receivers.

Ultimately the analysis of Lord Richards in *R (Palmer)*, based on the treatment under various provisions of IA 1986 of IPs as contrasting with officers of the company, is likely to be held to apply to other IPs as well as to administrators.

## Why are administrators (and other IPs) not “managers”?

One notable aspect of the Supreme Court’s decision in *R (Palmer)* is that it does not deal with the potential issue of why an administrator is not a ‘manager’ of the company, so falling within the secondary category class, regardless of whether or not an administrator also falls within the “other

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<sup>12</sup> IA 1986, s 87 (voluntary liquidations) and s 167 and Sch 4, para 5 (court liquidations).

<sup>13</sup> IA 1986, ss 230 and 388.

<sup>14</sup> IA 1986, Sch B1, para 5.

<sup>15</sup> IA 1986, Sch 1.

<sup>16</sup> This may be a reason why liquidators may in practical terms be less likely to be caught up in a secondary liability as they may be less likely to be within the “consent, connive or neglect” test.

similar officer of the body corporate” category. It may be that this point was not argued, although the Divisional Court in the decision under appeal (and overturned) in *R (Palmer)* had discussed the manager/officer distinction<sup>17</sup>.

## **Conclusion**

Lord Richards in the Supreme Court in *R (Palmer)* acknowledged that the effect of the decision was to exclude administrators from the secondary liability under TULCRA 1992 despite the administrator being the person in control of the company at the relevant time. He held that the secondary class wording was not clear enough to cover administrators – there was “no scope for such an extended reading” (at [42]). Lord Richards held that Parliament could easily have adopted a more functional test (at [51]).

Lord Richards held that the term “officer” (at least in TULRCA 1992) is “essentially a constitutional test. Does the person hold an office within the constitutional structure of the body corporate as is the case with directors, managers and secretaries?” (at [55]). The reference to “managers” as holding office within a corporate structure is perhaps less easy to follow than directors or secretaries.

Given the large number of legislative provisions using similar secondary wording, it may be that future legislation seeks to clarify that IPs are included within the secondary class – on the basis that once in office they are the real managers and decision-makers within the company. This remains to be seen.

## **Appendix: Pensions crimes and fines**

Various pensions crimes and fines in the pensions legislation, in particular PA 1995, PA 2004, PA 2008<sup>18</sup> and in the significant amendments and extensions made (from October 2021) by the

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<sup>17</sup> *R (Palmer) v Northern Derbyshire Magistrates Court* [2021] EWHC 3013 (Admin), [2022] ICR 531, DC at [106] to [112].

<sup>18</sup> PA 2008 mainly relates to the employer duties in relation to auto-enrolment.



inclusion of new crimes and an enhanced “financial penalty” regime in PA 2004, s 88A, by the Pension Schemes Act 2021 (PSA 2021).

There are now three levels of penal provision in the pensions legislation:

- **crimes**
- **financial penalties** (of up to £1m) – PA 2004, s 88A<sup>19</sup>.
- **civil penalties** – where the legislation cross-refers to PA 1995, s 10<sup>20</sup>. The maximum penalty is £5,000 for an individual or £50,000 for a company. The civil penalty provisions are scattered liberally throughout the pensions legislation.

### **Director, manager and officer, etc extension**

Where the offending company has committed an offence then the relevant legislation creating the offence often<sup>21</sup> includes extension wording providing that a director, manager, secretary and other similar officers of the offending company can also be guilty of that offence.

If the offence was committed by the offending company “with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in such capacity”, that person is also guilty of that offence.<sup>22</sup>

### **Pensions legislation: crimes**

PA 1995 includes a general extension provision.

#### **Pensions Act 1995**

#### **115.— Offences by bodies corporate and partnerships.**

<sup>19</sup> Inserted by PSA 2021, s 115, with effect on and from 1 October 2021 and only in relation to acts or omissions after that date - the Pension Schemes Act 2021 (Commencement No 3 and Transitional and Saving Provisions) Regulations 2021 (SI 2021/950).

<sup>20</sup> Slightly oddly, at least one of the civil penalty provisions is free-standing and does not just refer to s 10. The specific civil penalty in regulation 18A of the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (SI 2006/349, as amended). This was added into the 2006 consultation regulations on and from 6 April 2009 by SI 2009/615. The penalty looks similar to that in PA 1995, s 10, but the regulations do not (unlike s 10) contain a secondary person extension.

<sup>21</sup> See, e.g. in the employment and pensions statutes, TULRCA 1992, s 194(3); Social Security Administration Act 1992; s 115; PSA 1993, ss 157, 168, 169; PA 1995, s 115; Employment Rights Act 1996, ss 180 and 190; PA 2004, s 309; and PA 2008, s 47.

<sup>22</sup> Similar provisions appear in other statutes such as the Fire Precautions Act 1971, s 23(1); the Health and Safety at Work etc Act 1974, s 37(1); and the Environmental Protection Act 1990, s 157(1).

(1) Where an offence under this Part committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as to a director of a body corporate.

(3) Where an offence under this Part committed by a Scottish partnership is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner, he as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly.

Other pensions legislation has substantially identical criminal extensions to secondary parties, in particular: PSA 1993, s 169; PA 2004, s 309 and PA 2008, s 46.

### **Pensions: financial penalties (PA 2004, s 88A, inserted by PSA 2021)**

TPR (acting through its determinations panel) also has power to require the payment of civil penalties and (from October 2021 under PSA 2021) financial penalties.<sup>23</sup> These can be levied by TPR against employers and others under the pensions legislation.

The penalty provisions contain a similar extension<sup>24</sup> to directors, managers and officers etc as applies to crimes. These provisions render a director, manager, secretary or other similar officer of a company potentially individually liable for any civil penalties levied under the relevant pension legislation by TPR on the company for failure to comply with a relevant provision of PSA 1993, PA 1995, PA 2004, PA 2008, PSA 2021 and any relevant regulations.

In relation to financial penalties under PA 2004, s 88A the extension to secondary parties only applies to cases of consent or connivance and does not refer to 'neglect'<sup>25</sup>. The exclusion of "neglect"

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<sup>23</sup> The power in PA 2004, s 88A for TPR to impose financial penalties (initially of up to £1m) for breach of specified provisions in PA 2004 was inserted by PSA 2021 with effect on and from 1 October 2021 - the Pension Schemes Act 2021 (Commencement No 3 and Transitional and Saving Provisions) Regulations 2021 (SI 2021/950).

<sup>24</sup> PSA 1993, s 168(6) and (7); PA 1995, s 10(5) and (6); PA 2004, s 88A(6) and (7); and PA 2008, s 46.

<sup>25</sup> This omission of 'neglect' occurs in other legislation as well, for example: Bribery Act 2010, s 14; Theft Act 1968, s 18; Public Order Act 1986, s 28; and Copyright Designs and Patents Act 1988, s 110 (the last three cited in *Blackstone's Criminal Practice 2021* at A6.25). Blackstone comments that the offence still remains wider than aiding or abetting in that a positive act is not required.

from s 88A(6) may perhaps reflect that the financial penalties under s 88A can be much larger in amount than those for the civil penalties in PA 1995, s 10. Section 88A(6) provides:

**Pensions Act 2004, s 88A(6)**

- (6) Where—
- (a) a penalty under this section may, apart from this subsection, be imposed on a body corporate, and
  - (b) the act in question was done with the consent or connivance of a director, manager, secretary or other similar officer of the body or a person purporting to act in any such capacity, this section applies to that person.

**Pensions: civil penalties (PA 1995, s 10)**

TPR<sup>26</sup> (acting through its determinations panel) also has power to require the payment of civil penalties under PA 1995, s 10. These civil penalties have a smaller maximum than the new financial penalties under PA 2004, s 88A. The smaller civil penalties are of up to £50,000 for a company and £5,000 for an individual<sup>27</sup>. The secondary party extensions under PA 1995, s 10(5) to (6) are very similarly expressed to those in PA 2004, s 88A, save that the extensions in s 10 apply to 'neglect', as well as to consent or connivance.

**Pensions Act 1995, s 10**

- (5) Where
- (a) apart from this subsection, a penalty under this section is recoverable from a body corporate or Scottish partnership by reason of any act or omission of the body or partnership [...] 1, and
  - (b) the act or omission was done with the consent or connivance of, or is attributable to any neglect on the part of, any persons mentioned in subsection (6), this section applies to each of those persons who consented to or connived in the act or omission or to whose neglect the act or omission was attributable.
- (6) The persons referred to in subsection (5)(b)—
- (a) in relation to a body corporate, are —

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'A conscious failure to prevent or report a fellow director committing an offence would seem to be enough, even though there is not a sufficiently clear or immediate right of control over the fellow director to give rise to liability as an accessory'.

<sup>26</sup> Before 2005, the Occupational Pensions Regulatory Authority (OPRA).

<sup>27</sup> These maximum figures can be increased by an order by the Secretary of State under PA 1995, s 10(2), but no such order has been made and the maxima have not increased since 1995.

(i) any director, manager, secretary, or other similar officer of the body, or a person purporting to act in any such capacity, and

(ii) where the affairs of a body corporate are managed by its members, any member in connection with his functions of management, and

(b) in relation to a Scottish partnership, are the partners.

(7) Where the Authority requires any person to pay a penalty by virtue of subsection (5), they may not also require the body corporate, or Scottish partnership, in question to pay a penalty in respect of the same act or omission.

Both the financial penalty in s 88A and the civil penalty provisions in s 10 state that the relevant penalties cannot be charged against the company if they have already been charged against a director or officer, etc in respect of the same act or omission<sup>28</sup>. This provision strictly does not seem to prevent the converse, i.e. TPR could conceivably require a director or officer to pay a penalty even after the company has been so required.

For example PA 2004, s 88A(9):

*If the Regulator requires a person to pay a penalty by virtue of subsection (6) ..., it may not also require the body corporate ... in question to pay a penalty under this section in respect of the same act.*<sup>29</sup>

### Chart on neglect limb

Pensions Crime/fine	Director/manager/officer etc liable if:		
	Consent?	Connivance?	Neglect?
Crime	Yes	Yes	Yes
Financial penalty	Yes	Yes	No
Civil penalty	Yes	Yes	Yes

<sup>28</sup> PA 2004, s88A(9) and PA 1995, s10(7)

<sup>29</sup> In PA 2004, s 88A, the term 'act' includes omission – s 88A(12).

Financial penalties and civil penalties are recoverable by TPR<sup>30</sup>. Once received by TPR, the amount recovered must be paid to the Secretary of State<sup>31</sup> or into the consolidated fund<sup>32</sup>. The amount of the penalty does not therefore help TPR's funding or the relevant pension scheme.

#### *Pensions: crimes*

Examples of criminal sanctions on employers under the pensions legislation include:

- failing to provide information required by TPR by a formal notice under PA 2004, s 72 – PA 2004, s 77;
- knowingly or recklessly providing<sup>33</sup> false or misleading information to TPR – PA 2004, s 80 or the Pension Protection Fund (PPF) – PA 2004, s 195;
- wilful failure to comply with the auto-enrolment duty – PA 2008, s 45;
- knowingly to be concerned in the fraudulent evasion of the duty on the employer to pay to the relevant scheme any employee contributions which have been deducted at source by the employer from pay – PA 1995, s 49(11). A similar offence applies in relation to 'direct payment arrangements' (e.g. personal pensions) – PSA 1993, s 111A(12);
- a trustee or manager who agrees in the determination to make an investment in breach of the restrictions on employer-related investments – PA 1995, s 40(5). A trustee who "fails to take all such steps as are reasonable to secure compliance" with the restrictions on employer-related investments can be liable to a civil penalty (under PA 1995, s 10) – PA 1995, s 40(4).

#### *Pensions: new crimes under PSA 2021*

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<sup>30</sup> PA 1995, s 10(8) and PA 2004, s 88C(1).

<sup>31</sup> PA 1995, s 10(9).

<sup>32</sup> PA 2004, s 88C(4).

<sup>33</sup> These offences relate to "any person" providing false or misleading information. It is not clear whether the primary information offence (a) is incurred by the individual person who actually supplies the information or (b) is incurred by the relevant company for whom that individual is acting (using the usual attribution rules for corporate knowledge) or perhaps both. If (a), the potential for a secondary liability is reduced; if (b) then a secondary liability can arise.

PSA 2021, with effect on and from 1 October 2021, amended PA 2004 to add various new crimes in relation to pensions and added new powers for TPR to levy enhanced financial penalties (PA 2004, s 88A).

The new crimes now in PA 2004 include:

- failure to pay a s 38 contribution notice (without reasonable excuse) – PA 2004, s 42A;
- avoidance of an employer debt under s 75 – PA 2004, s 58A; and
- conduct risking accrued scheme benefits – PA 2004, s 58B.

It was already a crime (before 2021) for a person to knowingly or recklessly provide false or misleading information to TPR (PA 2004, s 80) or to the PPF (PA 2004, s 195).

#### *Pensions: financial penalties*

Under the amendments to PA 2004 (made by PSA 2021 on and from 1 October 2021), the potential for financial penalties (under PA 2004, s 88A) of up to £1m on a person, including an employer, can arise for:

- failure to pay a contribution notice under s 38 without reasonable excuse – PA 2004, s 40B;
- avoidance of an employer debt under s 75 – PA 2004, s58C;
- conduct risking accrued scheme benefits – PA 2004, s 58D;
- failure to notify TPR of a ‘notifiable event’ - PA 2004, ss 69<sup>34</sup> and 69A<sup>35</sup>;
- knowingly or recklessly providing false or misleading information to TPR – PA 2004, s 80A; and
- knowingly or recklessly providing false or misleading information to pension scheme trustees - PA 2004, s 80B.

#### *Pensions: civil penalties*

Examples of potential pensions civil penalties (under PA 1995, s 10) on an employer are:

- failing to pay across employee contributions within the required time without a reasonable excuse - PA 1995, s 49;

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<sup>34</sup> Before 1 October 2021, failure to notify TPR of a notifiable event under s 69 could incur a civil penalty under PA 1995, s 10.

<sup>35</sup> PA 2004, s 69A envisages extended notifiable events, but as at the date of writing is not yet in force.



- failure to report a breach of law to TPR – PA 2004, s 70; and
- failure without reasonable excuse to pay contributions under the schedule of contributions – PA 2004, s 228(4)(b).

The Pensions Law Handbook<sup>36</sup> used to contain a useful list of potential criminal and civil penalties under the pensions legislation<sup>37</sup>, but this has been dropped in recent editions.

*Pensions fixed penalty and escalating penalties*

TPR also has power to issue fixed penalty notices and escalating penalty notices,<sup>38</sup> broadly for failure to comply with auto-enrolment requirements or information or investigation notices from TPR under PA 2004, ss 72–75. However, these provisions do not include any secondary party (e.g. director or officer) extensions, unlike those applicable to crimes or other civil penalties.

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<sup>36</sup> Current edition is the 16th edition by CMS Pensions Team (Bloomsbury Professional, 2023).

<sup>37</sup> For example, the 12<sup>th</sup> edition (2015), Appendix I.

<sup>38</sup> PA 2008, ss 40 and 41 and, inserted by PSA 2021, PA 2004, ss 77A and 77B. The provisions in PA 2004 incorporate, in PA 2004, ss 77A(5) and 77B(7), the provisions dealing with auto-enrolment penalties in PA 2008, ss 42 to 44.