

Pensions Law technical bites:
New Crimes, Fines and Penalties
under PSA 2021

(2) Elements of a crime

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6 April 2021

Crimes, Fines and Penalties

- New powers for **the Pensions Regulator** (TPR)
 - under the **Pension Schemes Act 2021** (PSA 2021)
 - amending the **Pensions Act 2004** (PA 2004)
-
- Series of short webcasts
 - focusing on particular aspects of the new provisions
 - Will be under 10 minutes each
 - Already had:
 - (1) Overview and TPR Choices (30 March 2021)
 - This webcast will cover:
 - (2) Elements of a Crime: Intent and Purpose
 - Later technical bite webcasts:
 - Reasonable excuse
 - Non-connected persons
 - Role of advice/issues for advisers
 - Time limits/retrospection
 - Standard of proof
 - Overseas issues

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Crimes, Fines and Penalties

Caution!

- These webcasts are just discussions
- Intended for professional advisers
 - If you are not a solicitor, you should get legal advice from a solicitor
 - If you are a solicitor, you should consider formally instructing a barrister
- This is new legislation – not yet in force
- Much will depend on the facts of each situation
- Risk of action being taken by TPR may depend on its policy

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Crimes, Fines and Penalties

- TPR and new teeth
- Wide ambit
- May need to be a constant check:
 - Could the pension scheme or support for the pension scheme be affected? – now or in the future?
 - Does what is happening look to have a “reasonable excuse”
 - Will it still look reasonable in the future?
 - Will a jury decide that?
- What is likely to be TPR’s likely reaction?
 - now and in the future?

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New crimes and penalties

Failing to comply with CN

s40A Offence/ s40B: Financial penalty

Avoidance of employer debt

s58A Offence/ s58C: Financial penalty / New CN ground

Conduct risking accrued scheme benefits

s58B Offence/ s58D: Financial penalty / New CN ground

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Crimes and penalties

Widely framed

- Not just employers or trustees (or associates)
 - Could apply to any person
 - NB potential to extend to directors and managers of corporate
- Not limited to “wilful or reckless” acts (compare Govt responses)
- Potentially catches many acts or omissions that affect pension schemes
- Major defence – reasonable excuse

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PSA 2021: potential new liabilities

New criminal offences

- very widely framed (deliberate)
- Unlimited fine/ 7 years max sentence
- Not limited to persons connected or associated - can apply to any person
- If company guilty, potential for directors/managers/officers of corporate offender to be guilty too

New Financial Penalty power for Pensions Regulator (TPR)

- Up to £1m penalty
- Can apply to any person
- If company liable, potential for directors/managers/officers of corporate offender to be guilty too

Wider CN powers

- Target must still be “connected or associated” with a scheme employer

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PSA 2021: new crimes and liabilities

Two groups of major new crimes/Financial penalties/[and CN grounds]:

1. Avoidance of employer debt

- Act/failure/course of conduct that prevents recovery of s75 debt due from the employer /prevents s75 debt becoming due/compromises such a debt/reduces the amount of such a debt
- Person **intended** act (or failure to act or course of conduct) to have that effect; and
- No reasonable excuse

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PA 2004: 58A Offence of avoidance of employer debt

s58A(2): A person commits an offence only if—

(a) the person does an act or engages in a course of conduct that—

- i. prevents the recovery of the whole or any part of a debt which is due from the employer in relation to the scheme under section 75 of the Pensions Act 1995 (deficiencies in the scheme assets),
- ii. prevents such a debt becoming due,
- iii. compromises or otherwise settles such a debt, or
- iv. reduces the amount of such a debt which would otherwise become due

(b) the person **intended** the act or course of conduct to have such an effect, and

(c) the person did not have a **reasonable excuse** for doing the act or engaging in the course of conduct.

(3) A reference in this section to an act or course of conduct includes a failure to act.

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PA 2004: 58A Offence of avoidance of employer debt

(4) This section does not apply to a person if the act done, or course of conduct engaged in, by the person is in accordance with the person's functions as an insolvency practitioner in relation to another person.

(5) For the purposes of this section a reference to a debt due under section 75 of the Pensions Act 1995 **includes a contingent debt** under that section.

(6) Accordingly, in the case of such a contingent debt, the reference in subsection (2)(a) to preventing a debt becoming due is to be read as including a reference to **preventing the occurrence of any of the events** specified in section 75(4C)(a) or (b) of the Pensions Act 1995 upon which the debt is contingent.

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PSA 2021: new crimes and liabilities

2. Conduct risking scheme benefits

- Act/failure/course of conduct that detrimentally affects in a material way the likelihood of scheme benefits being received
- Person **knew (or ought to have known) intended act** (or failure to act or course of conduct) **would** have that effect; and
- No reasonable excuse

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58B Offence of conduct risking accrued scheme benefits

s58B(1): Does not apply to a money purchase scheme (or one prescribed in regs)

(2) A person commits an offence only if—

- (a) the person does an act or engages in a course of conduct that **detrimentally affects in a material way** the **likelihood** of accrued scheme benefits being received (whether the benefits are to be received as benefits under the scheme or otherwise),
- (b) the person knew or ought to have known that the act or course of conduct **would** have that effect, and
- (c) the person did not have a **reasonable excuse** for engaging in such conduct.

(3) A reference in this section to an act or a course of conduct includes a failure to act.

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58B Offence of conduct risking accrued scheme benefits

(4) A reference in this section to accrued scheme benefits being received is a reference to benefits the rights to which have accrued by the relevant time being received by, or in respect of, the persons who were members of the scheme before that time.

(6) Accrued rights = s67, PA 1995

(7) Ignore PPF and FAS benefits

(8) Does not apply to IPs

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3 elements

1. Causation:

Crim: Act (or failure) has the relevant effect – *actus reus*

Fin Pen: person was “a party” to relevant act

2. Intent/knowledge/purpose

s58A: intention – NB Criminal Justice Act 1967, s8

Corporate intent?

s58B: knowledge

Fin Pen: purpose

3. No reasonable excuse (Crim)/ not reasonable (Fin Pen)

Crim: Onus of prof on prosecutor – beyond reasonable doubt

Fin Pens: “not reasonable” – onus?/standard of proof?

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(1) Causation

1. Causation:

Crim: Act (or failure) has the relevant effect – *actus reus*
[Fin Pen: person was “a party” to relevant act]

- Must be cause of relevant effect.
 - Eg “does an act that” prevents relevant s75 debt – s58A
- No caselaw yet
 - Looking at other statutes, probably does not need to be sole cause
 - But probably must be substantial: eg *R v Cheshire*

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(1) Causation

R v Cheshire [1991] 3 All ER 670, CA:

Murder case.

Man shot in leg and taken to hospital. Died over two months later – problems in breathing, but immediate cause of death was medical treatment in hospital.

Bedlam LJ:

“In a case in which the jury have to consider whether negligence in the treatment of injuries inflicted by the defendant was the cause of death we think it is sufficient for the judge to tell the jury that they must be satisfied that the Crown have proved that the acts of the defendant caused the death of the deceased adding that the defendant's acts **need not be the sole cause or even the main cause of death** it being sufficient that his acts contributed significantly to that result. **Even though negligence in the treatment of the victim was the immediate cause of his death**, the jury should not regard it as excluding the responsibility of the defendant **unless the negligent treatment was so independent of his acts, and in itself so potent in causing death**, that they regard the contribution made by his acts as **insignificant**.

It is not the function of the jury to evaluate competing causes or to choose which is dominant provided they are satisfied that the defendant's acts can fairly be said to have made a **significant contribution** to the victim's death. We think the word "significant" conveys the necessary substance of a contribution made to the death which is **more than negligible**.

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(1) Causation

Contrast *R v Hughes* [2013] UKSC 56, [2013] 1 WLR 2461

Case on driving a motor vehicle on a road without insurance and otherwise than in accordance with a licence, contrary to s3ZB, Road Traffic Act 1988

Collision all the fault of the other driver. But CA held that s3ZB offence found.

Overtaken by the SC on appeal

“But for” cause and legal cause

23. The law has frequently to confront the distinction between “cause” in the sense of a sine qua non without which the consequence would not have occurred, and “cause” in the sense of something which was a legally effective cause of that consequence. The former, which is often conveniently referred to as a “but for” event, is not necessarily enough to be a legally effective cause. If it were, the woman who asked her neighbour to go to the station in his car to collect her husband would be held to have caused her husband's death if he perished in a fatal road accident on the way home. In the case law there is a well recognised distinction between conduct which sets the stage for an occurrence and conduct which on a common sense view is regarded as instrumental in bringing about the occurrence. There is a helpful review of this topic in the judgment of Glidewell LJ in *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360. Amongst a number of English and Commonwealth cases of high authority, he cited at pp 1373–1374 the judgment of the High Court of Australia in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 515, in which Mason CJ emphasised that it is wrong to place too much weight on the “but for” test to the exclusion of the “common sense” approach which the common law has always favoured, and that ultimately the common law approach is not susceptible to a formula.

Halsbury's Laws: See also *R v Hughes* [2013] UKSC 56 (uninsured and unlicensed driver involved in a collision whose driving was faultless and the deceased was 100% responsible, could not be found guilty of causing death by driving as there had to be some fault in his driving which contributed to the death);

applied in *R v Taylor* [2016] UKSC 5 (offence of aggravated vehicle-taking was not committed when, without fault in the manner of the defendant's driving, the vehicle was involved in an accident causing injury).

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(1) Causation

s58A: Act/failure/course of conduct that:

- a) Prevents recovery of s75 debt due from the employer
- b) prevents s75 debt becoming due
- c) compromises such a debt
- d) reduces the amount of such a debt

Includes contingent debt under s75

– potentially this is a reference to the contingent debt under s75 following an insolvency event – contingent pending the IP issuing a failure notice and this being accepted by the PPF

What is the position if:

- the relevant act or event is one that affects the employer – eg taking or enforcing security or paying a dividend; and
- at the time of the relevant act (or failure) there is no s75 debt due (or contingently due in an insolvency)?

Unlikely to be causal within (a) or (c)? And (b) and (d) may be unlikely, unless a debt arises fairly shortly?

Contrast the new CN ground (employer insolvency test)

– deemed s75 debt – s38C(1)(b)

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(1) Causation

s58B: Act/failure/course of conduct that detrimentally affects in a **material** way the **likelihood** of scheme benefits being received

The concepts of “material” and “likelihood” are not further defined.

Are they a probability test?

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(1) Causation: Failure to act?

s58A(3) and s58B(3)

A reference in this section to an act or a course of conduct **includes a failure to act**.

Arguable that much too wide if any failure causes the s75 debt reduction etc?

– eg would include not paying money to the employer?

Hinchy v Secretary of State for Work and Pensions [2005] UKHL 16 per Lord Scott at [39] (dissenting):

One would not normally describe a person as having 'failed' to do something that the person in question had no reason to do. 'Failed' or 'failure' both in the context of [the statutory provision under consideration], and in normal speech, has a tendentious quality. It implies that something has not been done that should have been done.

But not followed by Warren J in *Bonas* [2011] Pen LR 109 dealing with meaning of “deliberate failure” in a CN case:

88 I do not agree that a “failure” in the context of the phrase “deliberate failure to act” requires the leaving undone of something which ought to be done. In my view, the phrase means no more than that a person has perceived different possible steps and has decided not to take a step which he might, not necessarily ought, to have taken. His decision has resulted in “a deliberate failure to act” .

(2) Intent/knowledge

2. Intent/knowledge/purpose

s58A: intention – NB Criminal Justice Act 1967, s8

Corporate intent?

s58B: knowledge – “knew or ought to have known”

[Fin Pen: purpose]

s58A – intention

- Usually subjective – what did the def intend?

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(2) Intent s58A

OBG v Allan [2008] 1 AC 1, Lord Nicholls :

“166. Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant. This intent must be a cause of the defendant's conduct.”

A civil case

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(2) Intent s58A

Intent is usually subjective

- Not the same as desire or motive
 - see eg in a civil case, *James v Eastleigh BC* [1990] 2 AC 751 per Lord Goff at [38]
- Eg civil cases:
 - *IRC v Hashmi* [2002] EWCA Civ 981 (dog walker also posts a letter)
 - *JSC v Pugachev* [2017] EWHC 2426 (purpose is not the same as result)
 - *JSC v Ablyazov* [2018] EWCA Civ 1176 (intention to be judged based on whether desired – eg military commander ordering a missile strike)

Intent in crime = purpose or consequences if person knows is “virtually certain”

- *R v Nedrick* [1986] 3 All ER 1, CA

Foresight of probability of a consequence not enough?

- But may be evidence of intent? – *R v Jogee* [2016] UKSC 8

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(2) Intent s58A: Foresight?

CRIMINAL JUSTICE ACT 1967, s8

- A court or jury, in determining whether a person has committed an offence—
- (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
 - (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

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(2) Intent s58A: Foresight?

Moloney [1985] AC 905

- (a) intention should have the same meaning throughout the criminal law (Lord Bridge of Harwich at p920F, although cf Lord Steyn in *Woollin* [1999] AC 82), and
- (b) the foresight of the probability of a consequence does not of itself amount to intention but may be evidence of it (eg *Jogee* [2016] UKSC 8).

Hancock [1986] AC 455 at 473 per Lord Scarman:

[The guidelines] require a reference to probability. They also require an explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that consequence was also intended. But juries also require to be reminded that the decision is theirs to be reached upon a consideration of all the evidence.

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(2) Intent s58A: Corporate intent?

If a company is the defendant,

- How is its “intent” established?
- Must be directing mind and will – ie usually the board of directors
 - *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153. But can depend on context – *Meridian v Securities Commission* [1995] 2 AC 500
 - *SFO v Barclays plc* [2018] EWHC 3055 (QB) per Davis LJ at [66]. Crime focuses on culpability and is different from vicarious liability in tort at [67].

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(2) Intent s58A: Corporate intent?

SFO v Barclays plc: four propositions (at [86]):

- (1) Wording of a statute may impose liability or culpability on a company even if an unauthorised act
- (2) Courts will be slow to attribute criminal culpability to a company where it is the victim of the acts of the individuals representing its directing mind and will;
- (3) No general principle that the knowledge and approval of one director is to be regarded as the knowledge and approval of the board of directors (and thereby of the company);
- (4) a company may delegate its powers and responsibilities to a committee of individuals that will apply the acts and mental state of that committee to the company under the identification principle.

The doctrine as set out in *Tesco Supermarkets Ltd v Nattrass* may mean that larger companies are more readily absolved from criminal responsibility than smaller companies see [67] and [101]. It “would be quite wrong to presume that such devolved structures are put in place as a device to avoid corporate responsibility, criminal or otherwise”;

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(2) Intent s58A: Corporate intent?

2017:

the Ministry of Justice published a Call for Evidence on Corporate Liability for Economic Crime.

- The evidence submitted to the Call for Evidence was considered inconclusive by Government.
- There was no clear consensus from respondents on what corporate liability offence should be created if the identification doctrine was replaced. Equally, some responses disclosed significant opposition to reform while others questioned whether there was a need for further criminal sanctions at all in the already heavily regulated financial services sector.

November 2020:

the Government asked the Law Commission to examine the issue and publish a paper providing an assessment of different options for reform.

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(2) knowledge: s58B

s58B: knowledge – “knew or ought to have known”

“Knew” seems subjective

- May cover deliberate closing of eyes?

“ought to have known” is objective,

- but does it imply an need for an underlying duty to know?
- Eg a director of employer should informed of company affairs? So should be aware of pension scheme and hence impact?
- More tricky to show for a third party – when “ought” it to have known?

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New crimes

Offence	Nature of offence?	Persons Liable?	IP exempt?	Penalty
s40A: Failing to comply with a s38 CN	Fail to pay without reasonable excuse	<ul style="list-style-type: none"> • CN Target • Directors/ secretary/ manager/ similar officers of CN Target if consent/ connive/ neglect – PA 2004, s309 	No express exclusion	Fine (E&W: unlimited)
s58A: Avoidance of employer debt	Act/failure/course of conduct: <ul style="list-style-type: none"> • Prevents recovery of s75 debt due from the employer /prevents s75 debt becoming due/compromises such a debt/reduces the amount of such a debt • Person intended act (or failure to act or course of conduct) to have that effect; and • No reasonable excuse 	<ul style="list-style-type: none"> • Any person • Directors/ secretary/ manager/ similar officers of company if consent/ connive/ neglect – PA 2004, s309 	Yes (? Does not cover s309 extension?)	Fine (E&W: unlimited) Prison up to 7 years (conviction on indictment)
s58B: Conduct risking scheme benefits	<ul style="list-style-type: none"> • Act/failure/course of conduct that detrimentally affects in a material way the likelihood of scheme benefits being received • Person knew (or ought to have known) intended act (or failure to act or course of conduct) would have that effect; and • No reasonable excuse 	<ul style="list-style-type: none"> • Person doing act/failure to act/course of conduct • Directors/ secretary/ manager/ similar officers of party if consent/ connive/ neglect – PA 2004, s309 	Yes (? Does not cover s309 extension?)	Fine (E&W: unlimited) Prison up to 7 years (conviction on indictment)
s80: providing false or misleading information to TPR [EXISTING SECTION]	<ul style="list-style-type: none"> • Knowingly or recklessly providing false or misleading information to TPR • Save for info under some sections, person must intend or could reasonably be expected to know would be used by TPR for purpose of functions under PA 2004 or PA 1995 	<ul style="list-style-type: none"> • Any person • Directors/ secretary/ manager/ similar officers of company if consent/ connive/ neglect – PA 2004, s309 	No	Fine (E&W: unlimited) Prison up to 2 years (conviction on indictment)

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Comparison table: Avoiding s75 debt or risking accrued benefits: CN vs Fin Pen vs Criminal

	CN	Financial penalty	Crime
Prosecutor	TPR	TPR	TPR or DPP or SofS Consent needed
Tribunal	DP, with reference to UT	DP, with reference to UT	Court (Magistrates or Crown Court)
Def/target needs to be connected or associated with an employer?	Yes	No	No
IP liable as def/target?	No provided TPR is of the opinion that act/failure is “in accordance with his functions as an [IP] in relation to another person”	No provided TPR is of the opinion that act/failure is “in accordance with the person’s functions as an [IP] in relation to another person”	No provided act/failure is “in accordance with the person’s functions as an [IP] in relation to another person”
Time limit	Gateway act needs to be within 6 years period before warning notice issued. Seemingly reasonableness test can look at acts etc before gateway act (eg Box Clever – an FSD case)	No	Trial by indictment (Crown Court) – no time limit Summary trial (magistrate court) – 6 months for issue of summons: MCA 1980, s 127
Penal?	FSD – positive obligation (Bonas) CN – No – (Bonas)	Yes	Yes
Criminal	No	No	Yes
Burden of proof on TPR	Balance of probability	[Not clear]	Beyond reasonable doubt
Is limit overall or for each def (so can exceed cap in aggregate)?	For each target: <i>Re Storm Funding</i>	For each def: <i>Sutton v Norwich CC</i>	N/A

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Comparison table (2):

	CN	Financial penalty	Crime
Third party liability: directors and officers	No	Yes (if consent or connive) (NB claim against director/officer not available if already a claim for same act against co)	Yes (if consent or connive or due to neglect)
Third party liability: Liable if aid or abet/counsel or procure (or encourage)	No Unless third party was a “party to” the relevant act (including “knowingly assist”)	No Unless third party was a “party to” the relevant act (including “knowingly assist”)	Yes: Accessories and Abettors Act 1861 or Serious Crime Act 2007
Reasonable excuse defence?	TPR must consider CN reasonable: Some specific defences	Must not be reasonable to act/fail to act	Yes
Limit on monetary liability	£75 debt amount (NB timing to change (under PSA 2021) to end of scheme year before date of determination notice)	£1m (can be raised by SofS by regs)	No limit
Is limit overall or for each def (so can exceed cap in aggregate)?	For each target: <i>Re Storm Funding</i>	For each def: <i>Sutton v Norwich CC</i>	N/A
Act/failure can support claim on one of the other heads as well?	Yes	Yes (but not if criminal proceedings for same act)	Yes
Who gets any amount paid?	The scheme	The Crown	The Crown (potential for confiscation order under POCA)

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6 April 2021

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under PSA 2021

(2) Elements of a crime

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