

## **APS discretionary increase litigation – BA to appeal judgment**

As you may be aware, the High Court released its judgment on the APS discretionary increase litigation on 19 May 2017. The High Court ruled that both our decisions to introduce a discretionary increase power in 2011, and then to exercise that power by granting a 0.2% increase effective from 1 December 2013, were valid.

At a hearing on 25 May 2017, the High Court considered BA's applications for permission to appeal part of the judgment and for an order prohibiting the Trustee from making payment of the 0.2% awarded by the then Trustees on 19 November 2013 pending the outcome of BA's appeal.

The Judge decided that BA should be allowed to appeal his decision on two technical points. These two points are:

- the APS trust deed prohibits us making "benevolent or compassionate" payments and the judgment concluded that discretionary increases were not "benevolent or compassionate".
- the APS amendment power cannot be used to amend the purposes of the Scheme, and the judgment decided that by introducing and using the discretionary increase power the Trustees did not act inconsistently with the purposes of the Scheme or act for an "improper purpose".

The Judge made clear that he did not consider that his findings on these points were wrong. He gave BA permission to appeal because he accepted that there was a possibility that the Court of Appeal may disagree with his decisions on these technical points.

The Court of Appeal will decide whether it agrees that these two points of the High Court judgment were correct. Given the Court of Appeal's heavy caseload, it could take a further 18 months or longer to obtain a judgment from the Court of Appeal. By giving leave to appeal, the Judge has shortened the length of the appeal process. Had the Judge refused, BA would have been able to ask the Court of Appeal for permission to appeal, which if given might have added a further six months to the appeal process.

BA's appeal does not challenge the High Court Judge's findings that the then Trustees and their advisers acted appropriately in relation to the 2011 and 2013 decisions – the appeal will not change this conclusion.

At BA's request, the Judge also granted an order (known as an injunction) which means that we are not allowed to pay out the 0.2% increase awarded on 19 November 2013 to members until judgment is given by the Court of Appeal. If the Court of Appeal dismisses BA's appeal, the injunction will fall away.

The Judge expressed sympathy for the affected members and stated that, in light of an ongoing appeal process, the Trustee may not have felt able to pay members the 0.2% until the outcome of the appeal was known. The Judge decided that he should grant the injunction but that in exchange members will be entitled to be paid interest at 2% above base rate on that 0.2% increase from 25 May 2017 until the date of the Court of Appeal's decision. This is by way of compensation for the delay caused by BA's appeal in the event that BA's appeal is unsuccessful. BA would be required to pay or fund the interest.

BA has confirmed that it will meet the Trustee's costs associated with BA's appeal to the Court of Appeal.

We understand that this latest ruling will be disappointing for members. We are analysing the implications of this decision with our professional advisers and assessing the next steps.

We will provide further updates on developments through the member website.

Date: 26 May 2017