

Changes to legislation: There are currently no known outstanding effects for the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019. (See end of Document for details)

SCHEDULE

(introduced by section 2(1))

INVESTMENTS: SETTING RATE OF RETURN

Commencement Information

II Sch. in force at 1.7.2019 by S.S.I. 2019/197, reg. 2

This is Schedule B1 for insertion into the Damages Act 1996—

“SCHEDULE B1

(introduced by section B1(3))

SETTING THE RATE FOR SECTION B1(1): SCOTLAND

Regular review of rates of return

- 1 (1) The rate-assessor must review any original rate of return.
- (2) A review under sub-paragraph (1) must be started by the rate-assessor on the appointed day.
- (3) For the purpose of this paragraph—
 - (a) an original rate of return is—
 - (i) a rate of return to which paragraph 27(1) applies, or
 - (ii) the position of there being no rate of return to which paragraph 27(1) applies,
 - (b) the appointed day is the day on which the schedule of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 comes into force.
- 2 (1) The rate-assessor must review every subsequent rate of return.
- (2) A review under sub-paragraph (1) must be started by the rate-assessor—
 - (a) on the day after the last day of the 5-year period, or
 - (b) earlier within the 5-year period as is required by the Scottish Ministers.
- (3) Where a review under sub-paragraph (1) is started earlier by virtue of sub-paragraph (2) (b), it is to be treated as an extra review that does not affect the running of the 5-year period in relation to the previous review (and no 5-year period runs under sub-paragraph (2)(a) in relation to the extra review).
- (4) For the purpose of this paragraph—
 - (a) a subsequent rate of return is a rate of return that is set—
 - (i) for the time being (including by reason of an extra review as mentioned in sub-paragraph (3)), and
 - (ii) subsequently to an original rate of return as described in paragraph 1(3)(a) (including as a result of a review under sub-paragraph (1) conducted from time to time by virtue of the continuing operation of sub-paragraph (2)(a) and (b)),

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- (b) the 5-year period is the period of 5 years beginning with the day on which the previous review of a rate of return must be started (ignoring an extra review as mentioned in sub-paragraph (3)).
- 3 (1) A review of a rate of return under paragraph 1(1) or 2(1) must be concluded by the rate-assessor within the 90-day period.
- (2) For the purpose of this paragraph, the 90-day period is the period of 90 days beginning with the day on which the review must be started by the rate-assessor.

Overview as to rate-setting

- 4 (1) The conduct by the rate-assessor of a review of a rate of return under paragraph 1(1) or 2(1) is governed by—
 - (a) paragraphs 5 to 7,
 - (b) paragraphs 9 and 10,
 - (c) paragraphs 12 and 13,
 - (d) paragraphs 19 to 21.
- (2) A rate of return is to be set as a result of a review under paragraph 1(1) or 2(1) accordingly (plus see paragraph 23 as to reporting afterwards on the conduct of such a review).
- 5 In a review under paragraph 1(1) or 2(1), the rate-assessor must determine whether a rate of return to be set is to be—
 - (a) different from the rate of return with which the review is concerned, or
 - (b) the same as the rate of return with which the review is concerned.
- 6 In a review under paragraph 1(1) or 2(1), the rate-assessor must have regard to views—
 - (a) of any person whom the rate-assessor chooses to consult, and
 - (b) of any person whose advice the rate-assessor chooses to seek,
 where received by the rate-assessor timeously in connection with the review.

Returns-based assessment

- 7 (1) The basis on which the rate-assessor is to make a rate determination in a review under paragraph 1(1) or 2(1) is as narrated in sub-paragraph (2).
- (2) A rate of return should reflect the return that could reasonably be expected to be achieved by a person who invests—
 - (a) in the notional portfolio, and
 - (b) for a period of 30 years.
- (3) This is without prejudice to paragraphs 10 and 20 (with paragraph 10 to be met before paragraph 20 is met).
- (4) For the notional portfolio, see the table in paragraph 12(3).
- 8 The Scottish Ministers may by regulations modify a period mentioned in paragraph 7(2).
- 9 (1) Allowance must be made by the rate-assessor for the impact of inflation on the value of the return or investment to which paragraph 7(2) relates.

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- (2) The impact of inflation is to be allowed for by reference to, whether indicating an upward or downward trend—
- (a) the retail prices index within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988, or
 - (b) some published information relating to costs, earnings or other monetary factors as is, for use instead of the retail prices index, prescribed in regulations made by the Scottish Ministers.

Standard adjustments

- 10 (1) The standard adjustments must be made by the rate-assessor to a rate of return that would be arrived at but for this paragraph.
- (2) The standard adjustments are the deduction of—
- (a) 0.75 of a percentage point, to represent—
 - (i) the impact of taxation, and
 - (ii) the costs of investment advice and management, and
 - (b) 0.5 of a percentage point, as the further margin involved in relation to the rate of return.
- 11 (1) The Scottish Ministers may by regulations modify a figure appearing in paragraph 10(2) (a) or (b) (and update the adjacent text so that percentage points are referred to correctly in the singular or plural).
- (2) A figure as so modified—
- (a) may be zero or a positive number,
 - (b) if not a whole number (including zero), may comprise or incorporate a decimal fraction.

Notional investment portfolio

- 12 (1) As for the basis on which the rate-assessor is to proceed by virtue of paragraph 7(1), the notional portfolio is a combination of various types of things for investment in.
- (2) In the table—
- (a) the first column shows the types of things that the portfolio is composed of,
 - (b) the second column shows the percentage that each of the types of things is of the portfolio.
- (3) Here is the table—

cash or equivalents	10%
nominal gilts	15%
index-linked gilts	10%
UK equities	7.5%
overseas equities	12.5%
high-yield bonds	5%
investment-grade credit	30%

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property (heritable or moveable)	5%
other types (see the examples)	5%

(4) Examples of other types as mentioned at the bottom of the first column of the table are infrastructure, commodities, hedge funds and absolute return funds.

13 So far as necessary, if—

- (a) an entry in the first column of the table is not ascribed meaning by regulations under paragraph 14, or
- (b) any associated examples are not ascribed meaning by regulations under paragraph 14,

the entry is or (as the case may be) examples are to be interpreted by the rate-assessor as appropriate by bringing to bear professional knowledge of what the relevant terminology is commonly understood to mean in investment contexts.

Details within portfolio

14 The Scottish Ministers may by regulations ascribe meaning to—

- (a) an entry in the first column of the table in paragraph 12(3),
- (b) any associated examples.

15 (1) The Scottish Ministers may by regulations—

- (a) as respects the first column of the table in paragraph 12(3), add, remove or modify an entry or any associated examples,
- (b) as respects the second column of the table—
 - (i) add or remove a figure,
 - (ii) modify a figure.

(2) A figure so added, or as so modified—

- (a) may be zero or a positive number,
- (b) if not a whole number (including zero), may comprise or incorporate a decimal fraction.

Hypothetical investor

16 (1) Before a review under paragraph 2(1) is due to start, the Scottish Ministers must consider whether regulations under paragraph 14 or 15 are necessary for ensuring that the notional portfolio remains suitable for investment in by a hypothetical investor. In considering the matter, the Scottish Ministers must consult such persons as they consider appropriate.

(2) In considering the matter, the Scottish Ministers must consult such persons as they consider appropriate.

(3) No consideration of the matter is required ahead of an extra review as mentioned in paragraph 2(3).

(4) For who is a hypothetical investor, see paragraph 17(1).

17 (1) A hypothetical investor is someone who falls within each of sub-paragraphs (2) to (4).

(2) That is, someone who—

- (a) is a recipient of damages, and

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- (b) will—
 - (i) invest the damages, and
 - (ii) do so as properly advised.
- (3) That is, someone who—
 - (a) has no financial resources, apart from the damages, that can be used to meet the losses and expenses for which the damages are awarded, and
 - (b) will make withdrawals from the investment fund deriving from investment of the damages.
- (4) That is, someone whose objectives are of securing that the damages will—
 - (a) meet the losses and expenses for which the damages are awarded, and
 - (b) be exhausted at the end of the period for which the damages are awarded.
- 18 For the purpose of paragraphs 16 and 17—
 - (a) a reference to damages is to damages of the kind mentioned in section B1(1), and
 - (b) the damages are to be assumed to be received in a lump sum (rather than by way of periodical payments).

Expression of rates set

- 19 (1) A rate of return is to be set by the rate-assessor as a percentage figure.
- (2) The figure may be—
 - (a) zero, or
 - (b) a negative or positive number.
- (3) If the figure is not a whole number (including zero), the number is to comprise or incorporate a decimal fraction of 0.25, 0.5 or 0.75.
- 20 (1) A rate of return that would be arrived at but for this paragraph is to be rounded up or down by the rate-assessor to the nearest figure permitted, if necessary so as to come to—
 - (a) a whole number (including zero), or
 - (b) a number comprising or incorporating a decimal fraction of 0.25, 0.5 or 0.75.
- (2) If two permitted figures are equally near when rounding under sub-paragraph (1) arises, rounding is to be to whichever of the figures is reached—
 - (a) from the positive side of zero, by going towards (or to) zero, or
 - (b) from the negative side of zero, by going further below zero.

Single or multiple rates

- 21 (1) Except where the Scottish Ministers by regulations require more than one rate of return to be set by the rate-assessor, a rate of return is to be set so as to have effect for all cases.
- (2) Where more than one rate of return is set for the time being by virtue of regulations under sub-paragraph (1), a review under paragraph 1(1) or 2(1) is to be conducted separately in relation to each rate of return (and a reference in paragraph 2(4)(b) to the previous review is to be read as necessary for this).
- 22 Regulations under paragraph 21(1) must—
 - (a) specify the circumstances to which each rate of return is to relate,

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- (b) require the rate-assessor's report under paragraph 23 to cover each rate of return separately.

Reporting and effective date

- 23 (1) After a review under paragraph 1(1) or 2(1) is concluded, the rate-assessor must send to the Scottish Ministers a report on the conduct of the review.
- (2) The report is to be sent to the Scottish Ministers without undue delay (and no later than on the last day of the 90-day period described in paragraph 3(2)).
- (3) The report is to—
- (a) include—
 - (i) a rate determination made in the review,
 - (ii) a summary of the calculation of the rate of return (which may be accompanied by explanatory or supporting material),
 - (b) state the day on which the report is sent to the Scottish Ministers (and the day on which the review is concluded).
- 24 (1) The Scottish Ministers must lay the report before the Scottish Parliament as soon as practicable after the day on which they receive the report from the rate-assessor.
- (2) The rate-assessor must publish the report on the same day as the report is laid before the Scottish Parliament by the Scottish Ministers.
- 25 A rate determination comes into effect at the beginning of the day after the day on which the report including the determination is laid before the Scottish Parliament by the Scottish Ministers.

Reimbursement of costs

- 26 (1) The Scottish Ministers must adequately reimburse the rate-assessor for costs, including as to staff and outlays, incurred by the rate-assessor in exercising the rate-assessor's functions with respect to a review under paragraph 1(1) or 2(1).
- (2) No reimbursement is owed under sub-paragraph (1) if the rate-assessor is part of the Scottish Administration.

Transitional arrangements

- 27 (1) This sub-paragraph applies to a rate of return—
- (a) prescribed by an order made under section 1(1) of the Damages Act 1996, and
 - (b) having effect—
 - (i) in relation to Scotland, and
 - (ii) immediately before the appointed day.
- (2) A rate of return to which sub-paragraph (1) applies is to be treated from the appointed day as if it were set for the purpose of section B1(1).
- (3) For the purpose of this paragraph, the appointed day is the day on which the schedule of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 comes into force.

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- 28 (1) A review under paragraph 1(1) of the position of there being no rate of return cannot cause the maintaining of that position, so in conducting such a review in relation to that position—
- (a) paragraphs 5(a) and 33(5)(a) are to be read as if referring to a rate of return of some sort, and
 - (b) paragraphs 5(b) and 33(5)(b) are to be ignored.
- (2) On the question of a review under paragraph 1(1) of the position of there being no rate of return, see paragraph 1(3)(a)(ii).
- 29 (1) Paragraph 6 extends to views received, in advance of the appointed day, in anticipation of the starting of a review under paragraph 1(1).
- (2) For the purpose of this paragraph, the appointed day is the day on which the schedule of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 comes into force.
- 30 (1) Paragraph 26 extends to costs incurred, in advance of the appointed day, in anticipation of the starting of a review under paragraph 1(1).
- (2) For the purpose of this paragraph, the appointed day is the day on which the schedule of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 comes into force.

Procedure for regulations

- 31 (1) Regulations under this schedule may—
- (a) make provision to apply in all cases, or
 - (b) make different provision for different circumstances.
- (2) Regulations under this schedule are subject to the affirmative procedure.

Interpretation of schedule

- 32 In this schedule, a reference to the rate-assessor is to the official rate-assessor as mentioned in section B1(1).
- 33 (1) Sub-paragraphs (2) to (5) are also for construing this schedule.
- (2) A rate of return is a rate of return for the purpose of section B1(1).
- (3) A rate of return is set as a result of a review under paragraph 1(1) or 2(1) on the making in the review of a rate determination by the rate-assessor.
- (4) A review of a rate of return under paragraph 1(1) or 2(1) is concluded when the rate-assessor makes a rate determination in the review.
- (5) A rate determination is a determination by the rate-assessor that is to be made in a review under paragraph 1(1) or 2(1) of what the new rate of return is, either—
- (a) different from the rate of return under review, or
 - (b) the same as the rate of return under review.”.

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