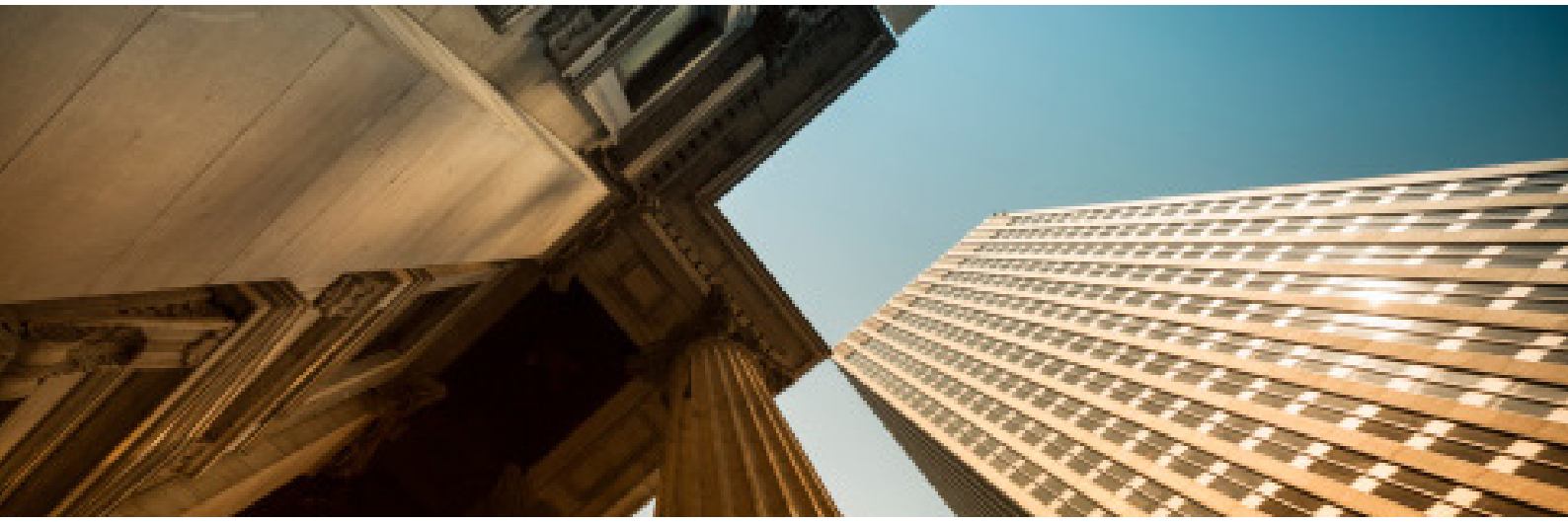
HERBERT SMITH FREEHILLS



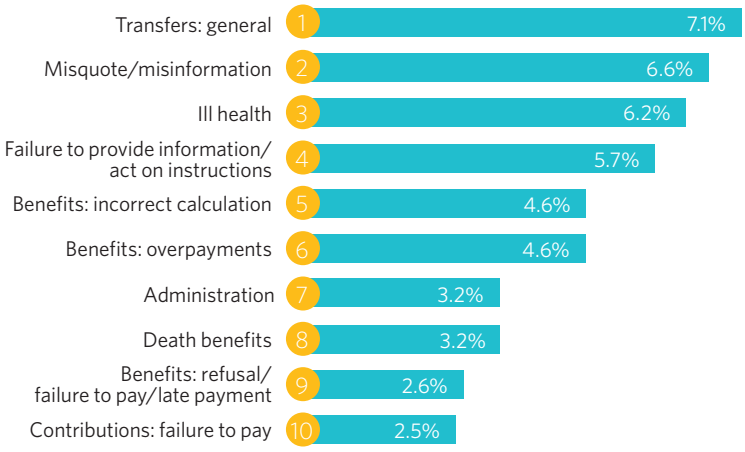
Pension disputes bulletin

OCTOBER 2019

Welcome to the first edition of our new quarterly pension disputes bulletin. In these bulletins we will report on key cases, Ombudsman determinations and regulatory activity and identify emerging risks for pension schemes, sponsors, administrators and other service providers.

The Pensions Ombudsman's annual report for 2018/19 shows that the number of pension related complaints continues to rise, with 1,538 new investigations opened by the Ombudsman in the past year (a 5% increase on the previous year). This is of particular relevance given the recent consultation regarding the expansion of the Ombudsman's jurisdiction and how best to make provision for early dispute resolution. The Ombudsman's annual report shows that the top ten reasons for new complaints remained broadly the same as in 2017/18, although the order has changed. Transfers continued to be the most common cause of complaints (representing 7.1% of new complaints in 2018/19). So that is where we begin in this edition.

Top 10 reasons for complaints to the Pensions Ombudsman 2018/19
(Percentage of new complaints)



Quick links

In this edition we examine:

In a hurry?

Read the 'Risk warning', 'Takeaways' and 'Comment' boxes for the key risks, points to note and our observations on each case / development.

Transfers

Administrators may be liable for investment losses caused by transfer delay

Takeaways

- It is forseeable that where a transfer is delayed the member may suffer investment losses.
- Complainant need only prove, on the balance of probabilities, that he would have invested the funds.
- Complainant does not need to prove exactly how funds would have been invested.

Summary

In *Tenconi v James Hay Partnership* [2019] 6 WLUK 162, the High Court overturned a determination of the Pensions Ombudsman which had previously rejected the complaint of a member against his pensions administrator concerning a delay in the transfer of his benefits to a Self Invested Personal Pension (SIPP) in June 2016. The member complained that, as a result of the delay, he lost the opportunity to invest in and benefit from the volatile market conditions following the Brexit referendum.

Decision

The Pensions Ombudsman rejected the complaint on the basis that the respondent financial services provider would not have had within its reasonable contemplation the member's lost opportunity to invest in the aftermath of the Brexit referendum. The member had also not been able to prove what shares he would have invested in had the transfer been carried out without delay.

However, the High Court has remitted the case back to the Ombudsman, finding that the Ombudsman had erred in concluding that the alleged loss was not in the reasonable contemplation of the parties. The judge found: "When a customer asks for his pension pot to be moved from one provider to another it is obvious that it is for the purpose or the possible purpose of investment; and it is equally obvious that if there is delay through maladministration of the transfer that the investor will or may lose the opportunity to invest over that period, and if there are spikes or perceived spikes in the market during that period that is likely or foreseeable to cause the investor loss."

The judge went on to provide guidance on how the Ombudsman should assess the case on remission, emphasising that this was not to be assessed as a 'loss of a chance' case. The complainant need only prove, on the balance of probabilities, that, had the transfer taken place without undue delay, he would have invested the funds in the event of a leave vote. If the Ombudsman is satisfied that this is the case, he must then turn to loss, determining the nature of the portfolio the complainant would likely have invested in. The complainant is not, at that stage, required to prove exactly which shares he would have bought.

Comment

In the context of the uncertain Brexit deadline, this is a timely reminder of the liabilities that can arise as a result of the unreasonable delay of transfers. PASA has also recently issued guidance on DB transfers which recommends that, in straightforward cases, transfers should be processed by scheme administrators within a matter of days.

PASA guidance requires administrators to process transfer requests within a matter of days

Takeaways

- In standard cases, transfer quote should be issued within seven or eight working days of member's request.
- Transfer should be paid within nine working days of application forms being returned.

Risk warning

- Administrators and actuarial firms should check whether their standard terms commit them to PASA's timescales.

PASA's guidance on defined benefit (DB) transfers notes that the time taken to process DB transfers varies significantly. In response, the guidance seeks to create a "faster, well-communicated, efficient and cost-effective" transfer strategy which the whole industry can adopt. The guidance suggests that for standard transfers, administrators should:

- issue a transfer quote to members within seven working days of an initial request being received (or eight working days where a referral to the scheme actuary is required), and
- conduct the necessary due diligence and make the transfer payment within nine working days of the application to transfer being sent back by the member or their adviser.

PASA plans to issue further guidance on non-standard and complex transfers towards the end of 2019.

Comment

There is a risk for pension administrators and trustees that the Pensions Ombudsman will view this guidance as setting the industry standard and that he will hold them to the deadlines set out in the guidance in any future member complaints.

Therefore, administrators and trustees should adhere to these timescales for processing transfers, where possible, to mitigate this risk. However, the risks associated with delays still need to be balanced against the risks arising as a result of failing to carry out adequate due diligence.

"This is a timely reminder of the liabilities that can arise as a result of the unreasonable delay of transfers"

Maladministration

There have recently been a number of decisions by the courts which highlight the increasing risks that administrators, sponsors and trustees face in relation to the administration of pension schemes. Maladministration claims can derive from systemic administrative issues spanning many years, which means they can be costly and complex to resolve.

Access to the Pensions Ombudsman as a low cost forum for individuals to pursue maladministration complaints suggests that there will be no slowdown in the increasing numbers of such claims. This trend is illustrated in the Pensions Ombudsman 2018/19 annual report which reveals that demand for its dispute resolution services continues to grow.

Member communications – disclaimer wording insufficient to protect administrators from consequences of inaccurate statements which resulted in significant tax charges for retiring members

Takeaways

- Administrators are expected to be aware of the tax rules related to protected pension ages and the re-employment of retiring members.
- Administrators are under a duty not to make statements that they should be able to forsee may be highly misleading.
- General statements may be misleading if they fail to take account of a member's individual circumstances.

Summary

In *Corsham v Police and Crime Commissioners for Essex* [2019] EWHC 1776 (Ch), the High Court overturned a determination of the Pensions Ombudsman in which the Ombudsman had dismissed complaints by police officers alleging that the police authority was under a duty to inform them of the adverse tax consequences of their retirement and subsequent re-engagement. The court held that the police authority, as the administrators of police pension schemes, owed a duty of care in tort to avoid negligent misstatement which they breached by informing retiring police officers that they would receive a tax-free sum on retirement. The case has been remitted back to the Ombudsman for a final determination.

Facts

The complainants were police officers who benefited from protected pension ages, which allowed them to take their pension after 30 years' service and before the normal minimum pension age of 55. Having taken early retirement, tax charges became payable by the retiring police officers when the police authority re-employed them in civilian roles within one month of their retirement. This resulted in them losing their protected pension age. Had their re-employment been deferred for a month, the tax charges would not have arisen.

The police authority had sent the retiring officers letters which assured them that they would be able to take tax-free lump sums. This was despite the Home Office having previously sent the authority a letter explaining the relevant tax rules and the changes to the legislation having been widely publicised.

Decision

The court held that the police authority:

i. was aware some of the retiring police officers had offers to be re-employed into civilian roles within one month of their retirement

ii. should have been aware of the tax charges under the Finance Act 2004 which these individuals would incur if that happened, and

iii. had a responsibility not to make misleading statements.

The court dismissed the police authority's argument that it could rely on the generic disclaimer wording found in the letters which explained that they were unable to provide the police officers with financial advice. The court found that, properly construed, such wording did not cover the misstatement made by the administrators.

Comment

This case illustrates that, despite the general reluctance of the courts to require trustees, administrators and employers to "advise" members on their options and the associated tax consequences of their decisions, it is nevertheless possible for members to succeed with claims where they have not been provided with sufficient information to make an informed choice.

Indeed, this decision shows that administrators cannot turn a blind eye to a member's circumstances, to the extent that the administrator ought to be aware of them, where those circumstances may affect the member's benefit entitlement and/or tax position.

The court's narrow interpretation of the disclaimer wording also highlights the importance of ensuring any disclaimer in member communications is appropriately drafted to cover all relevant issues.

Risk warning

- Administrators should take care when including generic statements which do not take account of member's individual circumstances.

"This decision shows that administrators cannot turn a blind eye to a member's circumstances, to the extent that the administrator ought to be aware of them"

Discrimination

Death benefits – scheme rule excluding death benefits for cohabiting partner due to estranged marriage is discriminatory

Takeaways

- Scheme rules that treat married couples and co-habiting partners differently should be looked at carefully.
- Where a discriminatory provision arises in the context of social and welfare policy in relation to a public fund the discriminatory effect will be justified unless the provision is manifestly without reasonable foundation.

Summary

In *Langford v Secretary of State for Defence* [2019] EWCA Civ 1271, the Court of Appeal held that a rule of the RAF pension scheme which prevented a surviving cohabiting partner from receiving a spouse's pension because she was still married to her estranged husband was unlawfully discriminatory.

Facts

The claimant, who was in a 15 year relationship with an officer in the Royal Air Force prior to his death, challenged a rule of the pension scheme which required unmarried partners to have been in an "exclusive relationship" in order for the surviving partner to be entitled to receive death benefits on the death of a member.

Decision

The court held that the relevant rule constituted unlawful discrimination under Article 14 of the European Convention on Human Rights (protection from discrimination), read with Article 1 of the first Protocol (protection of property), on the basis that the exclusivity requirement discriminated between the appellant on the one hand and partners of scheme members who were not married to the scheme member or to any other person on the other hand.

The Secretary of State submitted that any discriminatory treatment was justified on the basis that it was intended:

i. to achieve parity of treatment between married and unmarried partners of scheme members

ii. to prevent double recovery by the partner in the event that their estranged spouse was also a member of the same or a similar public service scheme, or

iii. to avoid an increase of scheme costs and administrative inconvenience.

The Secretary of State also argued that, as the exclusionary rule arose in the context of social and welfare policy regarding the payment of benefits from public funds, any discriminatory effect would be justified unless it was manifestly without reasonable foundation.

The Court accepted that this was the correct test but found that, on the evidence, none of the asserted aims gave rise to a reasonable foundation for the rule and as such the rule was unlawful.

Comment

This case illustrates how scheme rules need to be looked at carefully to identify potentially discriminatory provisions.

Trustees should review their scheme's rules to check for any similar requirements and, where relevant, consider whether any such requirements can be justified.

"The Court found that, on the evidence, none of the asserted aims gave rise to a reasonable foundation for the rule"

Scheme amendments

Parties must make clear if they intend to retrospectively validate invalid actions

Takeaways

- The introduction of a new trust deed and rules will not validate a previously invalid amendment unless it is clear that they are intended to do so.

Risk warning

- Parties should make clear what their intention is when making amendments (for example, in the recitals to the amending deed).

Summary

In *BIC UK Ltd v Burgess and others* [2019] EWCA Civ 806, the Court of Appeal ruled that the introduction of a new trust deed and rules in 1993 (the **1993 Deed**) did not validate pension increases that had been introduced by the trustees from April 1992 (and applied annually thereafter), where the manner in which those increases had been introduced had not complied with the scheme's formal amendment requirements at the relevant time.

Facts

By the early 1990s, the scheme in question had a surplus that the trustees were required to reduce. The minutes of a 1991 trustees' meeting, signed by only one of the trustees, recorded a resolution to use part of the surplus to increase pension payments to existing pensioners and improve future benefits. The increases were notified in a March 1992 announcement to members and they were applied annually from April 1992 onwards. However, no deed of amendment was ever executed to introduce the increases, as required under the rules at the relevant time.

In 1993, the trustees validly executed the 1993 Deed which introduced a new amendment power and new powers for the trustees to award pension increases and augment members' benefits. The new rules did not expressly refer to the pension increases. However, the 1993 Deed had an effective date of 6 August 1990 and, had the 1993 Deed been in force at the time that the pension increases were introduced, the introduction of the increases would have been valid as the manner in which they were introduced would have complied with the new power to award pension increases introduced by the 1993 Deed.

Decision

At first instance, the High Court held that the pension increases introduced in 1992 had been validated retrospectively by the 1993 Deed. However, the Court of Appeal ruled that the High Court's decision had gone "a step too far and involved the re-writing of history to an impermissible extent" as there was no evidence that the 1993 Deed had sought to validate an otherwise invalid amendment, or that there had been a common intention shared by the trustees and the principal employer to do this. As a result the pension increases were invalid.

In reaching this conclusion, Henderson LJ confirmed that it is possible, in principle, for trustees to correct an inadvertent breach of trust by way of a retrospective use of their scheme's amendment power, subject to any restrictions on the exercise of that power. However, where a power is introduced retrospectively which, had it existed at the relevant time, would have meant that a purported action of the trustees was valid it is not sufficient for the trustees merely to point to the existence of the power, they must also show that they intended to exercise the relevant power retrospectively in order to validate the historic action.

In order to establish that the powers introduced by the 1993 Deed, which would have validated the introduction of the pension increases, had been exercised, the Trustees sort to rely upon the doctrine of implied exercise of powers, relied upon in cases such as *Davis v Richards and Wallington* (1990). That doctrine provides, essentially, that where a trustee (T) purports to make a disposition of property which cannot be effected without the exercise of a power vested in T, the Courts will impute to T an intention to exercise the power even where the disposition makes no mention of the power, provided that an intention not to exercise it cannot be inferred.

However, Henderson LJ dismissed this argument on the basis that:

- in order to rely upon this doctrine, the relevant power must be in existence at the time the relevant disposition takes place and cannot be introduced retrospectively, and

Comment

This decision is another reminder for trustees and employers to ensure they comply with the formal requirements set out in their scheme's trust deed rules whenever they seek to make an amendment.

The decision also highlights the importance of recording the intention of the parties when making amendments. This can be done by summarising the rationale behind the amendments in recitals to any deed of amendment, in other explanatory provisions or in a separate written document.

"The decision also highlights the importance of recording the intention of the parties when making amendments"

Scheme amendments (continued)

- the fact that the 1993 Deed did not reflect the pension increases that had purportedly been introduced in 1992 led to the inference that the relevant power had not been exercised.

The trustees must now decide whether and, if so, how to recoup the overpayments to members. In its judgment, the High Court confirmed that the equitable self-help remedy of recoupment was available which would enable the trustees to offset past overpayments against future pension payments.

Is the Pensions Ombudsman a "competent court"?

In Bic, the Court of Appeal did not address the issue of whether the Ombudsman is a "competent court" for the purposes of section 91(6) Pensions Act 1995, which only permits recoupment to be used by trustees where a member's obligation to repay has become enforceable under an order of a competent court or in consequence of an award of an arbitrator.

In the High Court, Arnold J had suggested in obiter comments that the Ombudsman could not be regarded a "competent court" for these purposes. Given the Court of Appeal's silence on this, the issue remains unresolved. However, the Ombudsman has issued a factsheet in which it sets out why it considers itself to be a competent court for these purposes.

EU law prevents retrospective amendment even where this is permitted by a scheme's rules and national law

Takeaway

- The EU equal treatment laws may, in some circumstances, enhance the rights of members of the advantaged group by turning rights that can be altered retrospectively into rights that cannot.

Summary

Following a reference by the Court of Appeal to the Court of Justice of the European Union (CJEU) in *Safeway v Newton* (C-171/18), the CJEU has held that, in the absence of an objective justification, EU law prevents a pension scheme from equalising normal pension ages with retrospective effect, even where this is permitted under national law and under the Trust Deed governing the relevant pension scheme.

Facts

Following the decision of the CJEU in Barber in May 1990, the trustees of the Safeway scheme sought to equalise normal pension age (NPA) for men and women under their scheme by introducing a uniform NPA of 65 for men and women with effect from 1 December 1991. The trustees issued announcements to members on 1 September 1991 and 1 December 1991 explaining this. On 2 May 1996, a deed of amendment was adopted which reflected this change.

The power of amendment under the Safeway scheme allowed amendments to be made retrospectively with effect from the date of any prior written announcement to members. The deed of amendment also predated the restrictions on detrimental modifications introduced by section 67 Pensions Act 1995.

Decision

The CJEU has held that, in the absence of an objective justification, Article 119 of the EC treaty (now Article 157 of the Treaty on the Functioning of the European Union) prevents a pension scheme from equalising normal pension ages with retrospective effect, even where this is permitted under national law and under the Trust Deed governing the relevant pension scheme.

Although in the CJEU's view (based upon the evidence before it) there appeared to be no objective justification for the retrospective levelling down of NPA in this case, the CJEU recognised that this is ultimately a matter for the referring court to determine.

Comment

In reaching its decision, the CJEU failed to address the most important issue raised by the Court of Appeal which is that by preventing retrospective amendment in this case, the effect of the equal treatment laws was to gold-plate the rights of the advantaged and the disadvantaged members of the Safeway scheme. Under the scheme's rules and under national law a female member's normal pension age of 60 could have been changed to 65 retrospectively following the announcements issued in 1991. This meant it was a "defeasible right".

However, as a result of the CJEU's judgment, the effect of the decision in Barber was to turn that defeasible right into an indefeasible right in the period between the issuing of the announcement and the deed of amendment being executed.

Although this decision is unlikely to affect many other pension schemes, the fact that the equal treatment laws have been applied in this way may have wider implications.

Regulatory

Box Clever – Court of Appeal holds that it was reasonable to issue an FSD to ITV despite the fact that all relevant events took place before legislation was even contemplated

Takeaway

- Legislation which has a retrospective element may be introduced provided a fair balance is struck between affected parties and other stakeholders.
- New legislation can be introduced which enables regulatory action to be taken based on historic events.
- The Regulator can have regard to events that took place before 6 April 2005 when considering whether to issue an FSD.

Summary

In *Granada UK Rental & Retail Limited v The Pensions Regulator and another* [2019] EWCA Civ 1032, the Court of Appeal has dismissed ITV's appeal against the Upper Tribunal's ruling that a Financial Support Direction ("**FSD**") issued by the Regulator against five companies within the ITV Group (the "**Targets**") is valid.

Facts

The Box Clever Group Pension Scheme (the "**Scheme**") was established in 2001 after Granada (now known as ITV) and Thorn (now known as Carmelite) sold their TV rental business to the joint venture Box Clever. The Box Clever companies were the sponsoring employers of the Scheme, and neither Granada nor Thorn had any legal obligation to fund the Scheme following the sale.

Box Clever suffered financial difficulties and, in 2003, administrative receivers were appointed. In December 2011, the Regulator issued an FSD to the Targets requiring them to provide financial support to the Scheme. The Scheme has a deficit of around £115 million. In May 2018, the Upper Tribunal upheld the FSD and the Targets appealed this ruling to the Court of Appeal.

The Regulator did not issue an FSD against Thorn as it received mistaken advice that it was not "associated" with Box Clever on the basis that the appointment of administrative receivers in 2003 excluded control by the shareholders. The Regulator therefore provided a letter of comfort to Carmelite in 2009 meaning they could not be subject to any regulatory sanctions.

Grounds of Appeal

The Targets' appeal centred on three main issues:

1. **Retrospectivity**: Whether the provisions of the Pensions Act 2004 which granted the Regulator the power to impose FSDs is intended to have, and could lawfully be given, retrospective effect which permitted the Regulator to have regard to events which took place before the legislation became effective on 6 April 2005?
2. **Association:** Were the Targets "connected with or an associate of" any of the Box Clever employers of the Scheme for the purposes of Section 43 of the Pensions Act 2004 on the relevant date (31 December 2009)?
3. **Reasonableness:** Was it reasonable to issue an FSD given that the joint venture arrangements:
   i. are accepted to have been a reasonable commercial decision for the Targets to have taken at the time
   ii. did not involve any element of fault or misconduct on the part of the Targets, and
   iii. could not have been the subject of a clearance application to the Regulator since this option did not exist at the relevant time?

Court of Appeal's decision

Taking these points in turn:

1. On its proper construction, section 43 allows the Regulator to take account of events that occurred prior to 6 April 2005 when determining whether or not to issue an FSD. The court agreed with the Upper Tribunal that this did not breach Article 1 of the First Protocol to the European Convention of Human Rights or the Human Rights Act 1998 on the basis that the legislation struck a fair balance between the interests of potential targets, the members of underfunded schemes and PPF levy payers who would otherwise be required to meet the funding shortfall in the Scheme if it entered the PPF.
2. Applying the relevant legislative test, the court found that the Targets remained in control of one-third or more of the voting power in Box Clever's parent company, despite the appointment of administrative receivers, which meant they were "associates" of Box Clever at the relevant

Comment

This decision demonstrates that regulatory action can be taken on the basis of actions taken before the relevant regulatory powers came into force, or were even contemplated, where the legislation allows this and where it strikes a fair balance between the interests of different stakeholders.

In the context of FSDs, this decision confirms that the Regulator can rely on events which took place before 6 April 2005. This includes events which involved no element of wrongdoing on the part of the parties due to the 'no fault' nature of the FSD regime.

"This decision demonstrates that regulatory action can be taken on the basis of actions taken before the relevant regulatory powers came into force, or were even contemplated"

Regulatory (continued)

time. Although the administrative receivers (rather than the Targets) could decide how any voting rights would be exercised, the Targets remained the registered owners of the shares in Box Clever and the court deemed this to be sufficient.

3. The court held that the Upper Tribunal was entitled to conclude that the reasonableness test had been satisfied (and committed no error of law in doing so). The structure of the joint venture allowed Granada and the other shareholders to extract considerable value from the business without any risk of recourse to their own assets. The shareholders also continued to set the strategy of the joint venture and retained the prospect of extracting further value if the business was successful.

Dominic Chappell's appeal against contribution notices struck out

Summary

In *Dominic Chappell v The Pensions Regulator* [2019] UKUT 209 (TCC), the Upper Tribunal has rejected an application by Mr Dominic Chappell for the reinstatement of a reference made by him in February 2018 concerning contribution notices issued by the Pensions Regulator in January 2018. The Regulator sought payment of £9.5 million in respect of the two BHS Pension Schemes, on the basis that Mr Chappell had caused material detriment to the likelihood of accrued scheme benefits being received.

Mr Chappell's reference had been automatically struck out in November 2018 on his failure to comply with an "unless" order made earlier that month. In particular, he had failed to supply a list of the documents on which he was relying when filing a formal Reply to the Regulator's Statement of Case.

Decision

Although the CPR did not apply directly, the tribunal considered that it should follow CPR 3.9, which deals with applications for relief from sanctions. Following the approach adopted by the Court of Appeal in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906, the tribunal concluded that the breach was serious and significant, had occurred for no good reason and was aggravated by Mr Chappell's conduct.

As a consequence, the tribunal dismissed Mr Chappell's application for reinstatement.

Comment

This decision demonstrates the willingness of the Regulator to pursue individual directors, in appropriate circumstances, where they have been responsible for causing material losses to a defined benefit scheme.

The scope for the Regulator to take action against company directors, and the ease with which it can do so, are set to increase when the proposals to give it the power to pursue individuals who have engaged in wilful or reckless behaviour in relation to a DB pension scheme come into force.

FCA fines Standard Life Assurance Ltd £30.7 million for failures relating to non-advised annuity sales

Takeaway

- Pension firms' systems and controls to monitor quality of calls and information provided to customers should have fairness to customers at their heart.
- Firms should have detailed call guidelines and provide clear, fair and not misleading information about enhanced annuities and the option to shop around for a better deal.
- Financial incentives for staff should be aligned with customers' interests.

Summary

Standard Life Assurance Limited ("**SLA**") has been fined £30.7 million for breaching Principle 3 (management and control) and Principle 6 (customers' interests) of the FCA's Principles for Businesses.

"This decision demonstrates the willingness of the Regulator to pursue individual directors, in appropriate circumstances"

Facts

The FCA found that, between July 2008 and May 2016, SLA failed to put in place adequate controls to monitor the quality of the calls between its staff and non-advised customers by using high-level call guidelines which gave call handlers significant discretion about how they communicated with customers. SLA also offered its staff large bonuses to sell annuities, which encouraged them to place their own financial interests ahead of SLA customers. SLA was found not to have put in place sufficient systems and controls to mitigate the risks caused by the call guidelines and financial incentives, which led to some customers being treated unfairly.

SLA was formerly part of the Standard Aberdeen group of companies but on 31 August 2018 it was acquired by the Phoenix group. In January 2017, SLA voluntarily agreed to carry out a review to identify and pay compensation to customers who were likely to have, or did, suffer loss. As at May 2019, SLA had paid approximately £25.3 million to over 15,000 customers. SLA has closed its enhanced annuity product to new business and the review is ongoing. The estimated total compensation payable to customers is approximately £61.2 million.

Comment

This is a clear example of the FCA's willingness to exercise its enforcement powers in instances where it finds financial services firms have breached its Principles for Businesses. The financial penalties for such breaches can be severe, and so financial service firms should exercise caution when selling any form of pension or retirement savings products to consumers.

Key principles regarding the imposition of FSDs

In *Granada v The Pensions Regulator*, the Court of Appeal confirmed that:

- the question of whether it is reasonable to issue an FSD is, in the first instance, a judgment for the Regulator
- the matters to which the Regulator may have regard are not limited to those specified in section 43 Pensions Act 2004
- the weight to be given to each factor is for the Regulator to decide and they do not have to be given equal weight
- if an FSD is challenged, the burden is on the Regulator to demonstrate that the criteria for the imposition of the FSD are satisfied, including whether this is reasonable
- the Upper Tribunal is not simply a review body and it will consider the matter afresh where a reference is made to it
- an appeal from the Upper Tribunal to the Court of Appeal can only be made on a point of law
- the Upper Tribunal will be treated as a specialist tribunal and, within its field of expertise, the Court of Appeal will presume the Tribunal has got the law right, and
- as well as the imposition of an FSD itself having to be reasonable, separate consideration must be given to the reasonableness of any financial support that is required to be put in place.

Pension protection

Does the PPF have to provide 100% protection?

Risk warning

- When it comes, the CJEU's decision has the potential to re-write the UK's pension protection regime, with knock-on effects for scheme funding, PPF levies and the buy-out market.

Summary

In the German case of *Bauer v PSV* (Case C-168/18), the Advocate General of the Court of Justice of the European Union (CJEU) has indicated that individuals should receive 100% pension protection in the event of a corporate insolvency.

Background

This issue has already been the subject of several court cases and it was thought following the *Hampshire* case last year that Article 8 of the 2008 Insolvency Directive is complied with where compensation equal to at least half the value of the benefits provided under the original pension is provided.

However, in his Opinion in *PSV v Bauer*, Advocate General Hogan has stated that "a full re-appraisal of the case-law of the Court to date" is called for and concludes that "Article 8 imposes an obligation on Member States to protect all of the old-age benefits affected by an employer's insolvency and not just part or a designated percentage of these benefits".

The Advocate General stated that the Directive has direct effect against both member states and pension lifeboat institutions, which would include the PPF.

Comment

Whilst the CJEU generally follows the opinion of the Advocate General, it is not bound to do so. If the CJEU agrees with the Advocate General it is likely that this will have a significant impact on the level of compensation the PPF is required to pay with a knock-on effect on the PPF levy and the scheme funding regime for DB schemes in the UK.

The timing and nature of Brexit may determine whether the PPF is required to follow the decision of the CJEU. The timing of the CJEU's decision in this case could also be critical. Whilst the UK remains a member of the EU, British courts continue to be bound by the decisions of the CJEU. However, whether this continues to be the case and, if so, for how long will be determined by the terms on which the UK leaves the EU.

For more on this case see our blog post on Pension Notes.

Rectification

Court of Appeal clarifies test for rectifying terms of written contract for common mistake

Takeaway

- To establish a claim for rectification of a contractual document a party must prove that the document failed to give effect to:

  i a prior concluded contract, or

  ii a common intention shared by the parties.

- The existence of each party's intention must be established subjectively.
- Communications between the parties must show that they understood each other to share that intention.

Summary

In *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, the Court of Appeal upheld a decision granting rectification of two deeds because they did not reflect the parties' subjective common intention.

Facts

In November 2016 the claimant entered into two deeds to put in place security which had unintentionally been omitted from security documentation put in place in connection with a complex corporate acquisition which took place in 2012.

In order to provide the missing security, the claimant entered into deeds to accede to two pre-existing security agreements. However, the effect of acceding to these agreements was that the claimant not only provided the missing security but also undertook additional, onerous obligations.

At first instance, the late Henry Carr J, found as a fact that, when the deeds were executed, both parties understood and intended them to do no more than provide the missing security; no one involved in the transaction realised that the effect was to impose the additional obligations. In other words, he found that the parties subjectively had a common intention to execute a document which did no more than satisfy the claimant's obligation to provide the missing security. He also found that an objective observer would have concluded, from the background facts and the communications between the parties, that they had such a common intention. He therefore granted rectification of the deeds so as to exclude the additional obligations from their scope.

The defendant appealed. It did not challenge any of the judge's findings of fact. It argued, however, that:

- the test for rectification was purely objective
- identifying the objective intention of the parties was a question of law, on which the appeal court could form its own opinion, and
- the judge was wrong to find that, objectively assessed, the parties had a common intention which was not accurately reflected in the deeds.

Decision

The Court of Appeal dismissed the appeal. In doing so it confirmed the test for rectifying a contractual document on grounds of common mistake, on which there had been conflicting authority and uncertainty as to the state of the law.

The judgment determines that, to establish a claim for rectification of a contractual document, a party must prove that the document failed to give effect to either:

- **a prior concluded contract**, in which case the terms of the prior contract must be objectively determined, or
- **a common intention shared by the parties**, in which case the existence of the intention must be established as a subjective state of mind – though it must also be shown that, as a result of communication between them, the parties understood each other to share that intention.

The court disagreed with Lord Hoffman's (obiter) observations in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 that, even for the second limb above, the test is purely objective and subjective intentions are irrelevant.

Leggatt LJ, who gave the judgment of the court, explained the doctrine as resting on an equitable principle of good faith – ie that a party will not be allowed to enforce the terms of a written contract when that would be against conscience because it was inconsistent with the parties' mutual intentions at the time of contracting.

Therefore, unless and until there is a further appeal to the Supreme Court, the test to be applied is as set out above.

Comment

Although the decision arguably makes a claim for rectification more difficult to prove owing to the requirement for a subjective common intention, it does not represent a major shift for pensions cases.

The requirement to show a subjective intention is likely to apply to pensions cases. However, the requirement to demonstrate a shared intention expressed in communications between the parties does not apply in rectification cases involving a joint amendment power (which is common in pension deeds).

For more on this case see our blog post on Litigation Notes.

"If the CJEU agrees with the Advocate General it is likely that this will have a significant impact on the level of compensation the PPF is required to pay, the PPF levy and the scheme funding regime"

Looking ahead

Future cases and developments to look out for:

- ***PSV v Bauer*** (Case C-168/18) – the CJEU's judgment on whether EU law requires 100% pension protection to be provided on an employer's insolvency is also awaited (see 6.1).
- **PASA guidance on non-standard DB transfers** – expected by the end of 2019
- **GMP Equalisation Working Group's industry guidance on tax, data and impacted transactions** – expected during Autumn 2019
- **HMRC guidance on tax issues arising from GMP equalisation** – expected by the end of 2019.
- **Consultation on principles and framework for new DB funding Code** – due to be published by the Pensions Regulator alongside the Pensions Bill

GMP equalisation

PASA issues industry guidance on implementing GMP equalisation

Takeaway

- Schemes should take account of PASA's guidance when deciding how to implement GMP equalisation.
- The guidance sets out a pragmatic approach and addresses some of the tricky questions that may never be the answered by the Courts.

Summary

PASA has issued guidance, produced by the Equalisation Working Group, which outlines methods that schemes could use to implement GMP equalisation.

The guidance also addresses some of the tricky issues that are likely to arise on most GMP equalisation projects including what to do about:

- past transfers in
- "no further liability" cases (ie where a member or survivor has died or received a payment which purportedly extinguished their entitlement to benefits under a scheme), and
- "lack of opportunity" cases (ie where a member was unable to exercise an option under their scheme because if they did their benefits would not be enough to cover their GMP at the member's GMP age).

It also considers how DC schemes with GMP underpins should approach GMP equalisation.

PASA is due to issue further guidance in the coming months covering data, impacted transactions and tax.

Comment

By addressing some of the tricky issues that schemes will need to consider when implementing GMP equalisation, this guidance highlights some of the key risk areas which could sow the seeds of future complaints and legal challenges in this area if the relevant issues are not addressed correctly.

We sit on the sub-group that produced this guidance, so please let us know if you have any comments on it and we will ensure that these are fed in when the guidance is next updated.

Pension disputes key contacts

Samantha Brown
Head of Pensions
T +44 20 7466 2249
samantha.brown@hsf.com

John Whiteoak
Partner
T +44 20 7466 2010
john.whiteoak@hsf.com

Joseph Goddard
Associate
T +44 20 7466 2600
joseph.goddard@hsf.com

Paul Lewis
Head of Pension Disputes
T +44 20 7466 2138
paul.lewis@hsf.com

Antonia Pegden
Senior Associate
T +44 20 7466 2530
antonia.pegden@hsf.com

Thomas Jennings
Associate
T +44 20 7466 2622
thomas.jennings@hsf.com

Andrew Lidbetter
Partner
T +44 20 7466 2066
andrew.lidbetter@hsf.com

Dan Saunders
Senior Associate
T +44 20 7466 2036
dan.saunders@hsf.com

HERBERTSMITHFREEHILLS.COM

BANGKOK
Herbert Smith Freehills (Thailand) Ltd

BEIJING
Herbert Smith Freehills LLP
Beijing Representative Office (UK)

BELFAST
Herbert Smith Freehills LLP

BERLIN
Herbert Smith Freehills Germany LLP

BRISBANE
Herbert Smith Freehills

BRUSSELS
Herbert Smith Freehills LLP

DUBAI
Herbert Smith Freehills LLP

DÜSSELDORF
Herbert Smith Freehills Germany LLP

FRANKFURT
Herbert Smith Freehills Germany LLP

HONG KONG
Herbert Smith Freehills

JAKARTA
Hiswara Bunjamin and Tandjung
Herbert Smith Freehills LLP associated firm

JOHANNESBURG
Herbert Smith Freehills South Africa LLP

KUALA LUMPUR
Herbert Smith Freehills LLP
LLP0010119-FGN

LONDON
Herbert Smith Freehills LLP

MADRID
Herbert Smith Freehills Spain LLP

MELBOURNE
Herbert Smith Freehills

MILAN
Herbert Smith Freehills Studio Legale

MOSCOW
Herbert Smith Freehills CIS LLP

NEW YORK
Herbert Smith Freehills New York LLP

PARIS
Herbert Smith Freehills Paris LLP

PERTH
Herbert Smith Freehills

RIYADH
The Law Office of Mohammed Altammami
Herbert Smith Freehills LLP associated firm

SEOUL
Herbert Smith Freehills
Foreign Legal Consultant Office

SHANGHAI
Herbert Smith Freehills LLP
Shanghai Representative Office (UK)

SINGAPORE
Herbert Smith Freehills LLP

SYDNEY
Herbert Smith Freehills

TOKYO
Herbert Smith Freehills