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PENSIONS DISPUTES QUARTERLY

JANUARY 2025



The last three months

Court fixes problems with scheme documentation

A High Court [judgment](#) addressed various issues as to the governing documents of a DB scheme.

In 2001 and on two occasions in 2005, the parties had purported to amend the scheme's rules via "scheme amendment authorities" (**SAA**s). Among other things, the SAAs had provided for changes to pension increases. In 2006 the parties had adopted a new set of rules (the **2006 Rules**).

Under the scheme's amendment power, any amendment had to be declared in writing and signed by all trustees.

Three potential problems were later identified:

- **A fully-signed version of the 2001 SAA could not be found, though there were two different part-signed versions.** The Court said that secondary evidence can be used to prove the existence of documents. Based on witness testimony and the way in which the scheme had been administered, it was clear that all of the trustees must have signed the 2001 SAA. Against that background, the Court made the factual finding that the later of the two extant versions had been signed by all trustees.
- **On the face of it, one of the trustees had not signed the SAAs in his trustee capacity.** A Mr Beauchamp had signed each SAA against a signature block stating the signature to be on behalf of the employer. However, there was compelling evidence that Mr Beauchamp had intended to sign also as a trustee. On that basis, the Court ordered rectification of the signature blocks, to confirm that Mr Beauchamp had signed in both capacities.
- **The 2006 Rules did not reflect a change to pension increases made by a 2005 SAA.** The Court concluded that this was simply a mistake. There was nothing which suggested that the parties had intended to reverse the change to pension increases (eg no actuarial advice had been obtained). The Court ordered that the 2006 Rules be rectified in line with the 2005 SAA.

Court of Appeal quashes order giving creditor access to pension

The Court of Appeal [held](#) that a member could not be ordered to access funds under an occupational pension scheme in order to meet liability to a creditor.

The member had defaulted on a judgment debt. As in another recent case, [Bacci v Green](#), the High Court made an order in favour of the creditor under section 37 of the Senior Courts Act 1981. The order directed the member to exercise such rights as he had to draw down his pension fund, with payment to be made into the member's bank

account. The creditor would then obtain a further order, enabling them to access the money in account.

The member appealed against the section 37 order. The Court of Appeal allowed the appeal. The Court held that the order was inconsistent with section 91 of the Pensions Act 1995. Section 91 provides that, subject to specified exceptions, a court cannot make an order if the effect would be to restrain a person from receiving a pension under an occupational pension scheme.

The creditor argued that there was no breach of section 91, because, looked at in isolation, the section 37 order did not restrain the member from receiving his pension – on the contrary, the order required him to take it. The Court rejected that argument. A realistic and purposive approach had to be adopted. The effect of the order would in practice be to restrain the member from receiving his pension.

Financial dependence: successful appeal against Ombudsman determination

The High Court [allowed](#) an appeal against a ruling of The Pensions Ombudsman, in a case relating to the Local Government Pension Scheme (**LGPS**).

Mr Thomas and an LGPS member lived together but were not married. Following the member's death, Mr Thomas applied for a dependant's pension. Mr Thomas qualified if, broadly speaking, (1) he and the member were living together as man and wife, and (2) he was financially dependent on, or interdependent with, the member.

The relevant local Council decided that Mr Thomas did not meet either of the two tests. It said that (1) Mr Thomas and the member had not been living as man and wife; and (2) although Mr Thomas had produced evidence of his dependence on the member, he had not produced evidence of her dependence on him.

Mr Thomas complained to The Pensions Ombudsman. The Ombudsman ruled that the Council was wrong about test (1), but that its conclusion as to test (2) was valid.

Mr Thomas appealed to the High Court. The Court found that the Ombudsman had erred in law. The Council's decision as to test (2) was defective and should not have been upheld:

- The Council had approached the matter on the basis that Mr Thomas needed to show financial interdependence. But that was not correct. Test (2) could be met by showing financial dependence instead. And the Council appeared to accept that Mr Thomas was financially dependent on the member.

- Furthermore the Council's analysis of the evidence as to test (2) had probably been coloured by the conclusion which it had wrongly reached as to test (1) (ie that Mr Thomas and the member had not been living as man and wife).

The Court remitted the matter to the Council for review and a fresh decision.

Scams: Ombudsman awards £10m against trustee director

The Pensions Ombudsman [determined](#) that a corporate trustee (**ETL**) breached its duties under two money purchase schemes (the **Schemes**). He ordered ETL's former sole shareholder and director, Mr Shroff, to pay a total of £9.8m.

About 200 people had taken transfers from previous pension arrangements to the Schemes. ETL had invested Scheme assets in arrangements which were unorthodox and highly risky. The investments failed and, following an investigation by the Insolvency Service, ETL was wound up.

Several members of the Schemes complained to the Ombudsman. A complaint was also made by the replacement trustee.

The Ombudsman concluded as follows:

- ETL had failed to comply with requirements of the Pensions Act 1995 as to investment (eg requirements about obtaining advice and ensuring diversification).
- ETL had failed to comply with its fiduciary duty to invest for a proper purpose, ie in members' long-term interests.
- ETL had failed to comply with the requirement of the Pensions Act 2004 as to internal controls. This conclusion was informed by the fact that ETL had not followed various provisions of the Regulator's relevant Code of Practice (eg provisions about conflicts of interest).
- Although not himself a trustee, Mr Shroff had dishonestly assisted in the application of the Schemes' assets. He was therefore liable as an accessory to ETL's breach of trust.
- Mr Shroff was in any case liable on other bases. Having procured the breaches of trust by ETL, he was liable as a "constructive trustee". He was also liable as a "manager" and "administrator" of the Schemes. The Ombudsman's jurisdiction extends to people acting in those capacities.
- Members could not be said to have consented to the breaches committed by ETL. They might have chosen particular investments, but they did not know the full terms and circumstances. Given the nature of the breaches, neither ETL nor Mr Shroff could rely on a defence of contributory negligence.

- ETL was not protected by exoneration clauses in the Schemes' documents, or by indemnity forms which members had signed. The Pensions Act 1995 prevents trustees from excluding liability for breach of their investment duties.

- It was determined that Mr Shroff should pay £7.3m into one of the Schemes and £2.5m into the other. He should also pay £5,000 to each of the complainant members, as compensation for exceptional non-financial loss.

Ombudsman discusses dishonesty test in liberation ruling

The Pensions Ombudsman made substantial awards against individuals and companies involved in scams and pension liberation. The [determination](#) discusses at length the basis for determining whether behaviour is honest or dishonest.

Mr Kaigh and Mr McNally had set up three money purchase schemes (the **Schemes**). The trustees were, at different times, either Mr Kaigh or Mr McNally, or companies of which they were sole directors (the **Trustee Companies**). The trustees appointed another company (**Brambles**) to administer the Schemes.

More than 100 people took transfers from their existing pension arrangements into the Schemes. In many cases, people were promised that they would receive an initial payment on completion of their transfer, even if they were below minimum pension age.

The trustees used a small proportion of the Schemes' assets to make initial payments to members. They used the remaining assets to make payments to Brambles of £3,000 per member, supposedly to cover administration, and to invest in unlisted and unproven companies. There were close links between the trustees, Brambles, and many of the investments.

The investments failed. Members seeking to take benefits or transfers from the Schemes found Brambles to be unresponsive. Several members complained to the Ombudsman.

The Ombudsman ruled as follows:

- There had been multiple instances of maladministration, breach of legislation and breach of trust by the trustees.
- Mr Kaigh and Brambles were liable in respect of breaches of trust by the Trustee Companies, because they had dishonestly assisted in the breaches. The Ombudsman's jurisdiction extended to them in any case, on the basis that Mr Kaigh was a constructive trustee, and Brambles was an administrator.

- The trustees could not rely on a defence of member consent or contributory negligence. Nor, as regards the investment breaches, could they rely on exoneration clauses or indemnities (see above as to the Pensions Act 1995).

Additionally, the Ombudsman said:

- The payments which the trustees had made to Brambles were grossly excessive. The trustees had breached the Trustee Act 2000, which says that trustees should not pay agents more than is reasonable.
- Brambles had not run the Schemes to the standard which would be expected of a competent administrator. That amounted to maladministration.

The Schemes' exoneration clauses were expressed to protect trustees from liability except in cases of "wilful default" or "personal conscious bad faith" (the wording differed as between the Schemes). Whilst the exoneration clauses could not apply to investment breaches, they could in principle apply to other breaches. As to this, the Ombudsman said:

- There was no practical difference between "wilful default" and "personal conscious bad faith".
- In either case, as a matter of general law, a trustee could not be exonerated for dishonesty.
- Case-law suggested that honesty/dishonesty should be determined via two stages, one subjective and the other objective: (1) what was the individual's actual knowledge or belief; and (2) based on that knowledge or belief, was the individual's conduct honest or dishonest when judged by the standards of ordinary decent people.
- Assessed on that basis, various breaches committed by Mr Kaigh and Mr McNally were dishonest, meaning that they could not rely on the exoneration clauses. A similar conclusion would apply even if honesty/dishonesty was determined on an alternative (eg purely subjective) basis.

The Ombudsman ordered the former trustees to make payments to the Schemes totalling £5.2m. Mr Kaigh and Brambles were jointly and severally liable for part of the Trustee Companies' liability, on the basis of their dishonest assistance. The Ombudsman also awarded compensation of £4,000-6,000 to each complainant for non-financial loss.

Elsewhere in the Courts

Construction and rectification: A High Court ruling demonstrated that, while subjective intentions have no place in construing a contract, they are key when considering rectification. Further information can be found in our [blog post](#).

Limitation etc: The Court of Appeal clarified the restrictions on adding new claims to a claim form in circumstances where there is an arguable limitation defence. We published a [summary](#).

Liability caps: A Court of Appeal decision discussed principles as to the interpretation and application of contractual caps on liability. As we [reported](#), the Court found (on the facts) that an agreed cap was to be applied to each party's liability prior to any set-off.

Privilege: We issued bulletins on cases which considered the application of privilege in relation to [witness interviews](#), the [identity of third parties](#), [mediations](#) and [shareholder class actions](#).

Insurance Act: We [flagged](#) a High Court judgment concerning breach of warranty under an insurance policy. The Court discussed section 11 of the Insurance Act 2015, which prevents an insurer from relying on a breach if the breach could not have increased the risk of the loss which actually occurred.

Litigation funding: The Civil Justice Council published an interim report, summarised [here](#). Separately, the European Law Institute published [principles](#), intended as a blueprint for future guidance or regulation.

Supreme Court proceedings: New Supreme Court Rules came into force, and a dedicated website was launched. Our [blog post](#) provides details.

Looking forwards

Validity of amendments – TPT case

A case as to the validity of historic amendments to TPT (an industry-wide pension scheme) will come before the High Court next year. We understand that the hearing is listed for February 2025, and will consider, among other things, questions arising from the *Virgin Media* case.

In the meantime, industry bodies are urging the Department for Work and Pensions to issue regulations so as to validate amendments which would be void on *Virgin Media* principles. Whether the DWP will do so remains to be seen.

Litigation funding

The Civil Justice Council is expected to complete its review of litigation funding by summer 2025, following publication of its interim report. The previous Government had proposed legislation as to litigation funding, following the Supreme Court's *PACCAR* decision. The current Government has said that it does not intend to re-introduce legislation until the Council's review is complete.

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