

Outer Temple
Chambers

GMP EQUALISATION:
TRANSFERS

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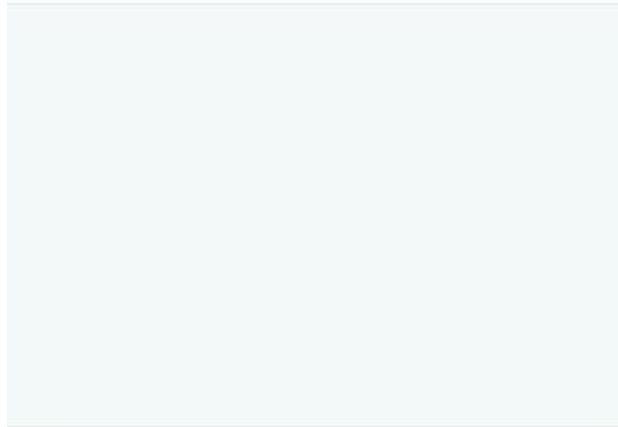
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Just one more sleep until the Lloyds
GMP equalisation transfer judgment
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Dave Brooks
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I was on a call with colleagues when it came out. All the actuaries buried their heads in their hands. It was quite a sight.

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***LLOYDS BANKING GROUP PENSION TRUSTEES
-v- LLOYDS BANK PLC & OTHERS*** [2020] EWHC 3135 (Ch)

- Historic transfers undervalued benefits
- Relevance not limited to GMP equalisation, although that did provide the context including the sums at stake and the period over which transfers at undervalue were made
- Subject to the permissibility of sex specific actuarial factors, the obligation to equalise applies directly to the calculation of transfer values
- The statutory scheme does not deal expressly with the issue
- Should the trustee be excused from complying with its obligations because it failed to comply with those obligations?

Statutory scheme before 6 April 1997

- SSPA 1975 / PSA 1993 and the Occupational Pension Schemes (Transfer Values) Regulations 1985
- Based around the right to a cash equivalent
- *“the amount of the cash equivalent of any benefits which have accrued to or in respect of him under the applicable rules”*
- Where T didn't transfer the cash equivalent of those benefits (properly construed and equalised), T hadn't *“done what the member required”* and was not entitled to benefit of statutory discharge under s. 99
- *“no legal difficulty”*

Statutory scheme before 6 April 1997

[97]

iv) the Trustee is not able to rely on section 99 to claim a discharge ... where the cash equivalent paid did not include the increases required to equalise benefits;

v) the transferring member is prima facie entitled to apply to the court for an order that the Trustee perform the outstanding duty on it;

vi) the Trustee is able belatedly to perform its duty even without an order of the court

Statutory scheme from 6 April 1997

- PSA 1993 (as amended) and Occupational Pension Schemes (Transfer Values) Regulations 1996
- Obligation on T to provide a “statement of entitlement”
- Statement of entitlement was a written statement of *“the amount of the cash equivalent ... of any benefits which have accrued to or in respect of him under the applicable rules”*
- Right to a transfer of the cash equivalent set out in the statement of entitlement
- Less straightforward

Statutory scheme from 6 April 1997

- Goode Report and subsequent White Paper: *Security, Equality, Choice: The Future for Pensions*, Cmnd 2594
- Reg 9(5) *If a member's guaranteed cash equivalent falls short of or exceeds the amount which it would have been had it been calculated in accordance with Chapter IV of Part IV of PSA 1993 and these Regulations it shall be increased or reduced to that amount.*
- Rejected submission that the obligation continued after the inadequate transfer payment was made.
- Nonetheless, T “*does not become free of its obligation under regulation 9(5) by failing to perform it.*”

Statutory scheme from 6 April 1997

“The workable solution”

[157] ...

ii) where the Trustee did not perform its obligation under regulation 9(5) prior to making the transfer payment, the Trustee committed a breach of its obligation at that time;

iii) a transferring member is entitled to apply to the court for an order that the Trustee belatedly perform that obligation; the Trustee is also able to perform its obligation belatedly;

...

v) the Trustee is not able to rely on section 99 to claim a discharge from its liability ...

Rules based discharge

- Rules provided for the Trustees to be discharged following a transfer
- They did not provide a discharge where the transfer was of a statutory CETV
- If it was a rules-based transfer outside the statutory scheme (e.g. in the 12 months before NRD) the decisions made by the Trustees (undervaluing the transfer value) were valid and effective and so the Trustees were discharged unless and until the decisions were subsequently set aside as being in breach of duty

Express / contractual discharges

- The Trustees required transferring members to sign documents discharging the Trustees from any further liability to pay benefits
- These were held not to discharge the Trustees as a matter of construction (particularly as the top-up was not payment of benefits)
- In the circumstances the Court did not deal with various issues arising out EU law or *Stilk v Myrick* [326]

Forfeiture rules [331 - 363]

- The various forfeiture rules did not extinguish the transferring members' rights or the Trustees obligations
- As a matter of construction, the forfeiture rules dealt with unpaid "benefits" (doubtless to dovetail with section 92 of the PA 1995)
- A right to a top-up payment was not a benefit for these purposes
- In the circumstances, the Court did not need to decide if a sufficient "*claim*" had been made for a properly calculated transfer value encompassing the top-up

Limitation [364 - 381]

- The failure to pay a properly calculated CETV was a breach of trust that occurred when the payment was made
- A claim for a top-up payment to be made from the assets of the Scheme is a claim for the recovery of trust property
- By virtue of section 21(1)(b) of the Limitation Act 1980, no statutory period of limitation applies to such a claim

Need anything be done?

The following would incline the court to require the Trustees to make good their default [273, 274]:

- i) the Trustee had committed breaches of fiduciary duty;*
- ii) the members are entitled to apply to the court for orders that the Trustee make top-up payments;*
- iii) the Trustee retained the trust assets from which the top-up payments are to be made;*
- iv) ... the Trustee cannot rely on a time bar ...*
- v) the Trustee needs to know which of the trust assets should remain available to make top-up payments which the court might order the Trustee to make.*

Need anything be done?

The Court did not decide whether wider considerations, such as the sums involved and the cost of administration, could be taken into account nor to what effect.

[276] In the circumstances all that I can usefully say is that the Trustee does need to be proactive in that it must consider the rights and obligations which I have identified, the remedies available to members and the absence of a time bar and then determine what to do.

How are the obligations arising under the statutory scheme to be satisfied?

- Where the transferring member remains a member of the receiving scheme, and the receiving scheme is willing to accept a top-up, a top-up is to be paid to the receiving scheme
- The top-up is to be calculated by reference to what should have been paid when the original transfer was made, together with interest at 1% over base
- The statutory provisions for enhanced payments in the absence of a reasonable excuse for the failure to comply with the statutory scheme (under regulation 4(4) of the 1985 Regs and regulation 10 of the 1996 Regs) did not apply

How are the obligations arising under the statutory scheme to be satisfied?

- Payment to the receiving scheme when the transferring member remains a member of that receiving scheme, will discharge the Trustees from further liability
- The top-up obligations upon the transferring scheme are concurrent with those, if any, upon the receiving scheme to equalise

Bulk Transfers [178 - 182]

- The Court considered only “mirror image transfers”,
- These depended upon actuarial certificates under reg 12 of the OPS (Preservation of Benefits) Regulations 1991 to the effect that the benefits in the new scheme were broadly no less favourable than those in the old
- As the new scheme benefits replicated those under the old scheme (both being modified to the same extent by article 157, the equal treatment or sex equality rule) the Trustees were discharged by section 73(2) and (4)
- Query how far this takes us in relation to other bulk transfers

Unanswered questions

- Can the sums involved / administrative cost of remedying past mistakes be taken into account? [275]
- What is to be done in relation to rules based transfers? Is this a case where trustees should refer the matter to court because there was “*no other suitable person*”? [277]
- What should be done where the transferring member is no longer a member of the receiving scheme, or where the receiving scheme is not willing to accept a top-up? [235ff]
- When can lump sum payments be made? [241ff]

Unanswered questions

- Can schemes be amended to permit lump sum payments instead of top-up payments?
 - During the hearing HMRC took a pragmatic view as to the operation of the Authorised Payment Regulations – especially in relation to when time started to run. This was subsequently confirmed in the GMP Equalisation newsletter – July 2020
- What is the position with other forms of bulk transfers? In particular, is an actuarial certificate that considered the wrong (i.e. unequalised) benefits valid and/or capable of founding a discharge?

Unanswered questions

- When is a “claim” made under the forfeiture rules?
[360]
- Is a receiving scheme that is not a DB scheme under an obligation to equalise benefits [406]
- Effect, if any, of Art 157.

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