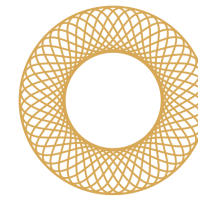


Outer Temple

Pensions Law Conference

Thursday 18 April 2024

Bristol

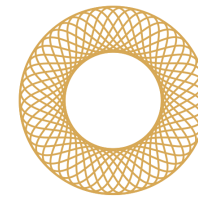


Outer Temple

TPO Update: Recoupment and Overpayments: Life after CMG?

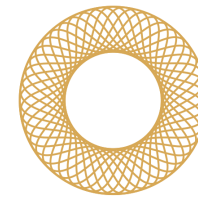
ELIZABETH GRACE

elizabeth.grace@outertemple.com



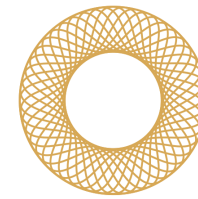
Outline

- Background: CMG in the Court of Appeal
- Recoupment: practice and procedure post-CMG
- Mr. Y CAS- 39869-Q8J7
- What would you do...?



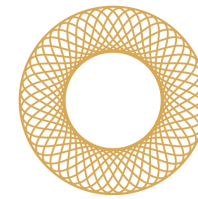
CMG in the Court of Appeal

- Decision in **The Pensions Ombudsman v CMG Pension Trustees Limited** [2023] EWCA Civ 1258 has changed landscape.
- TPO says the DWP "*is supporting legislative changes to formally empower TPO to bring an outstanding overpayment dispute to an end without the need for a County Court order*"; however, no further information forthcoming.....
- What do we do in the meantime?



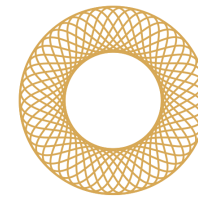
CMG in the Court of Appeal

- TPO is not a competent court for the purposes of s91(6) Pensions Act 95 (see Asplin LJ at paras 39 – 42).
 - Character of PO (paragraph 39);
 - Scope of jurisdiction (paragraph 40);
 - Legislative landscape (paragraph 41);
 - Natural and ordinary meaning of the words in s91(6) PA 1995 (paragraph 42)



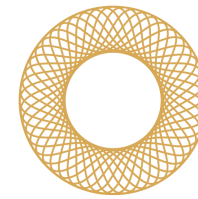
CMG in the Court of Appeal

- As a result: recoupment is a self-help remedy but:
 - It is a set-off caught by s91(5)(f) PA 1995 (see Asplin LJ at para 48)
 - Trustees can only help themselves if there is no dispute
 - Where there is a dispute, TPO is not the competent court
 - (NB: the threshold for a member to trigger a dispute is low (see, for example, Clift PO -2066 at para 38))



Practice and Procedure

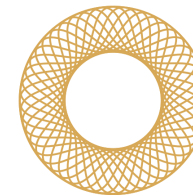
- Where there is a dispute:
 - Obtain a determination from TPO which has clear directions as to:
 - The amount of the overpayment
 - Extent of the set-off
 - Rate of the set-off
 - Then obtain an order from the County Court stating the amount of the overpayment and the extent and rate of the set-off (per Asplin LJ at para 45)



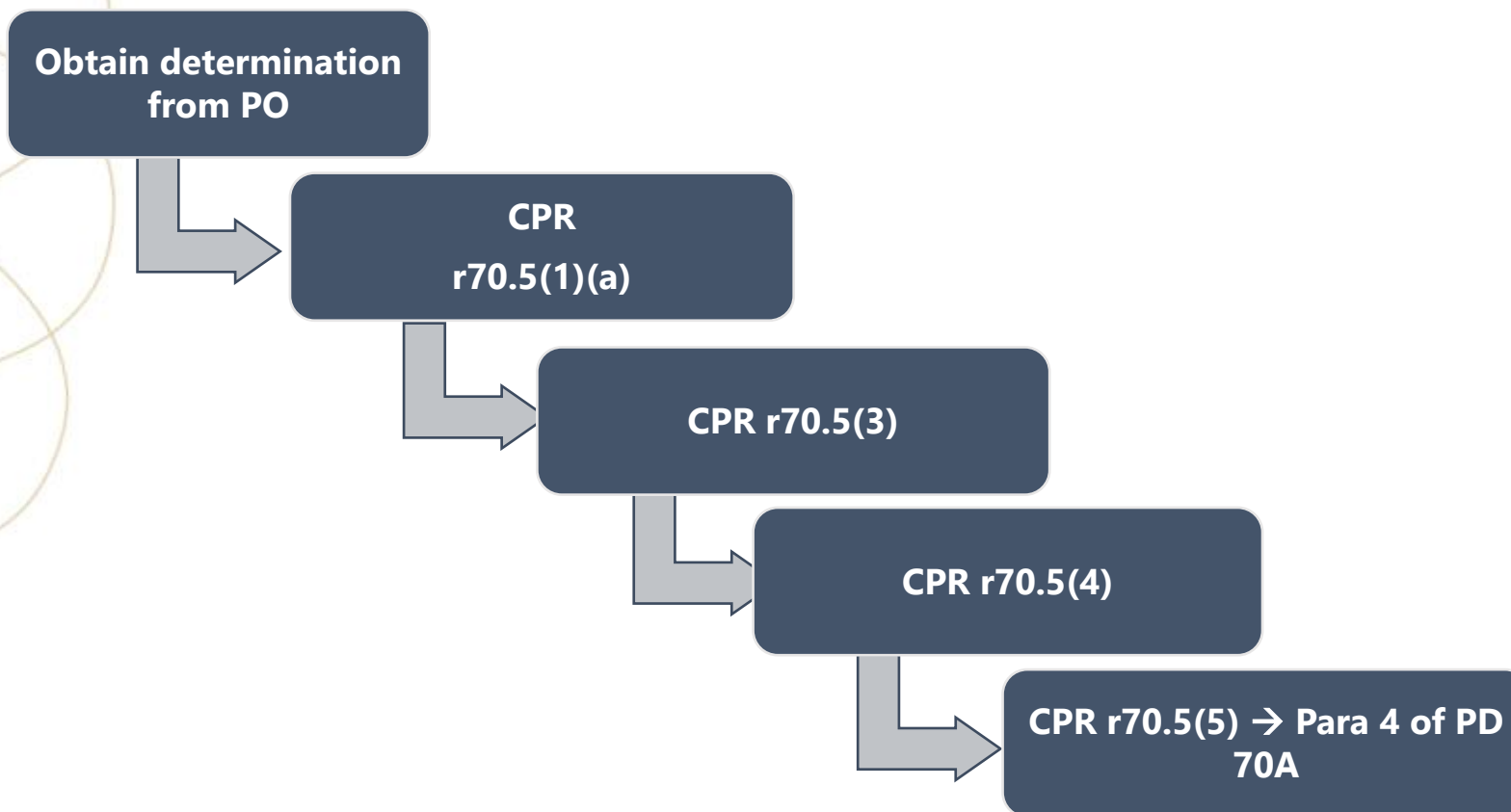
Practice and Procedure

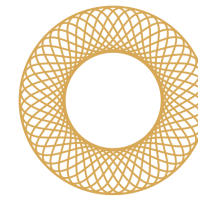
- Sounds easy to get an order from the County Court, doesn't it...?





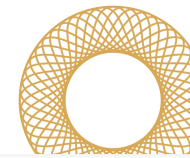
Practice and Procedure





Practice and Procedure

- How do you actually enforce a TPO determination in the County Court?
- The Court in CMG said it is an administrative matter:
 - Deliver certified copy of PO's decision to the County Court
 - "Appropriate court officer" will take necessary steps
 - Apply CPR 70.5
- Lord and Lady Justices of Appeal don't go to the County Court all that much...



Practice and Procedure

- My view:
 - Use form N322A (£47 issue fee)
 - Application is made without notice
 - Expect significant delays (c. 6 months?)
 - Hope for the best.

Application for an order to allow enforcement of a decision or ACAS conditional settlement (Form COT3) that requires permission to proceed

Name of court	
Claim number (to be completed by the court)	
Applicant	
Respondent	

The applicant applies to enforce a decision Dated
 settlement Dated
(If settlement, go to section 1 - Applicant's details)

and for an order that the respondent pay the costs of this application.

What is the name of the Tribunal/ court that granted your award.

Give the reference number of your decision

Please give details of the legislation that allows you to enforce this decision

A copy of the decision or ACAS conditional settlement (Form COT3) is attached.

1. Applicant's details

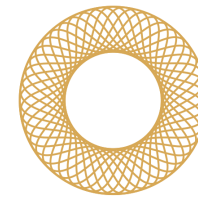
Name of applicant	Address for service (if different from opposite)
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Applicant's address	Postcode <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>
<input type="text"/>	
Postcode <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>	
Telephone no. <input type="text"/>	Ref. <input type="text"/>
Email address <input type="text"/>	

2. Respondent's details

Name of respondent	<input type="text"/>
Respondent's address	<input type="text"/>
Postcode <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>	

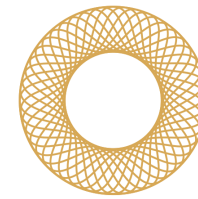
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N322A Application for an order to allow enforcement of a decision or ACAS conditional settlement (Form COT3) that requires permission to proceed (13.20)
© Crown copyright 2020



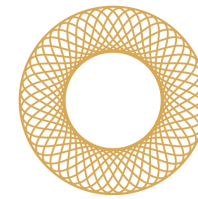
Mr. Y (CAS- 39869-Q8J7)

- First decision on recoupment since CMG
 - Overpayment based on miscalculated NRA; Trustee proposed recoupment, Mr. Y objected.
 - Trustee decided to withhold future increases on legal advice, absent evidence of hardship from Mr. Y
 - TPO found that Trustee was in breach of s91(6) PA 95: no order of competent court



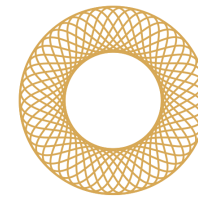
Mr. Y (CAS- 39869-Q8J7)

- Detailed consideration of defences open to the member in a recoupment case
- Helpful discussion regarding the threshold for good faith in change of position-type defences
- No maladministration: bear in mind that recoupment contrary to s91(6) PA 95 is breach of trust (but D&I award is likely to be remedy)
- Note addition of clear section at the end of the determination: "Determination and Directions" (from para 127 onwards)



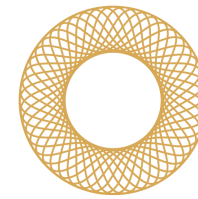
Mr. Y (CAS- 39869-Q8J7)

- How does TPO think this will be enforced? See para 124 of Mr. Y:
 - CoA has set out detailed procedure (has it?)
 - Copy of decision to be enforced must be filed with application
 - Enforcement is administrative (is it?)
 - County Court will enforce the determination and directions by making an order specifying the amount of the overpayment and specifying the amounts to be recouped over a specified period at a specified rate.



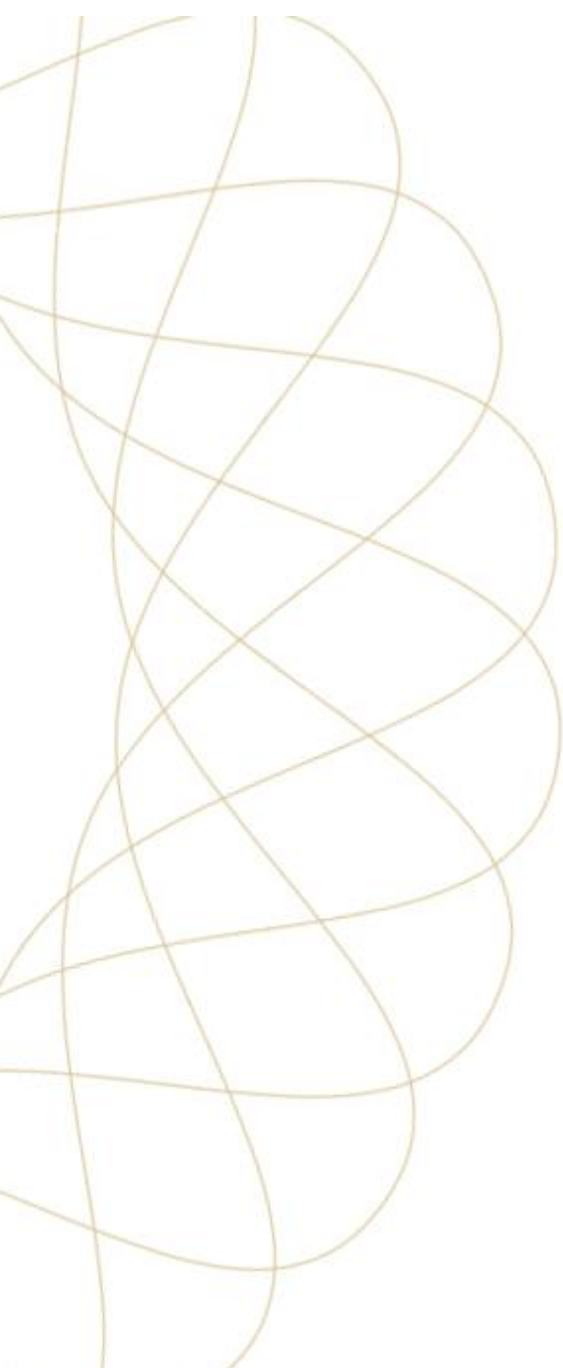
What would you do?

- You act for the Trustee in circumstances where a member has received overpayments. The Trustee wishes to recoup.
- The member has sent an email to the Trustee saying that they think they should get the higher pension and anyway, they've spent it all and can't pay their mortgage.
- The member has not gone to TPO.



What would you do?

- Your member cracks and brings a complaint to TPO.
- TPO considers that there obviously has been an overpayment, and that the Trustee is entitled to recoup.
- You get detailed directions including the rate and the amount of recoupment.
- You then dig out form N322A



Application for an order to allow enforcement of a decision or ACAS conditional settlement (Form COT3) that requires permission to proceed

Name of court
Claim number (to be completed by the court)
Applicant
Respondent

The applicant applies to enforce a decision Dated / /
 settlement Dated / /
 (If settlement, go to section 1 - Applicants details)
 and for an order that the respondent pay the costs of this application.

What is the name of the Tribunal/ court that granted your award.

Give the reference number of your decision

Please give details of the legislation that allows you to enforce this decision

A copy of the decision or ACAS conditional settlement (Form COT3) is attached.

1. Applicant's details

Name of applicant

Applicant's address

Postcode

Telephone no.

Ref.

Email address

Address for service (if different from opposite)

Postcode

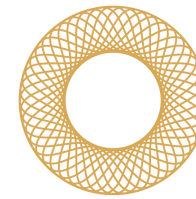
2. Respondent's details

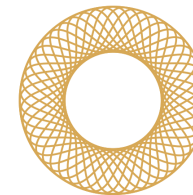
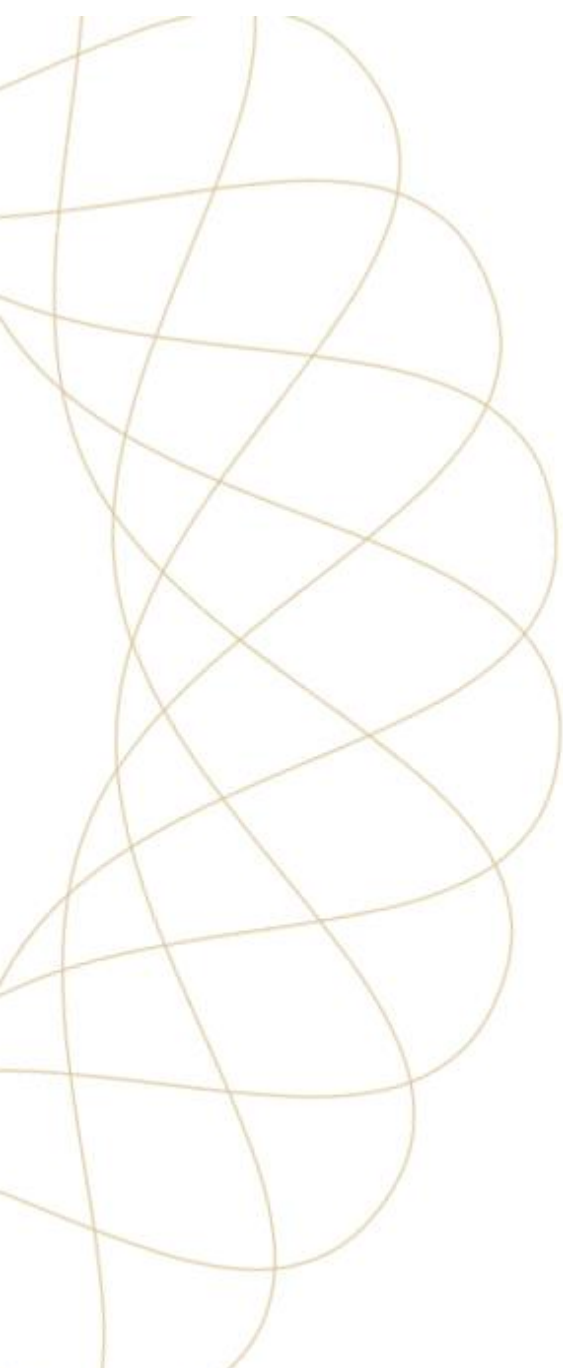
Name of respondent

Respondent's address

Postcode

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4. ACAS conditional settlement (Form COT3)

I certify that

I have the applicant has

complied with the terms contained in the notice of settlement.

By (please give details - continue on a separate sheet if necessary)

Condition 1

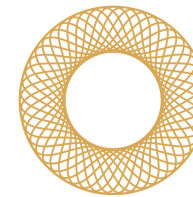
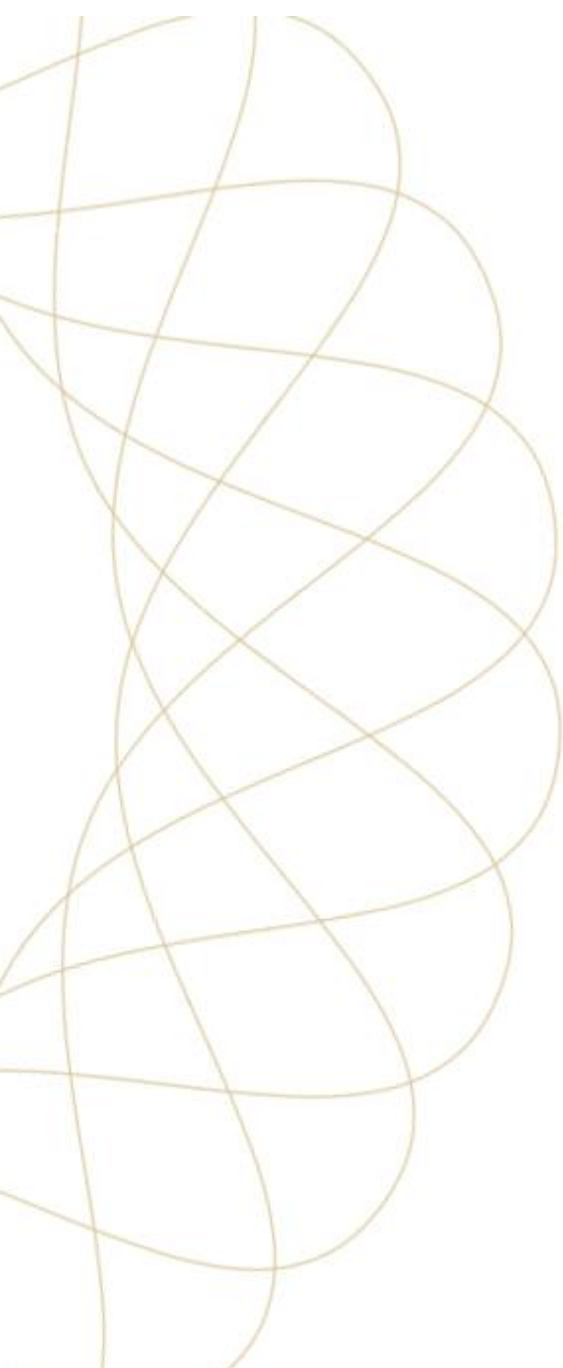
What was the condition attached to your settlement?

Please give details of how the condition has or has not been fulfilled?

Condition 2

What was the condition attached to your settlement?

Please give details of how the condition has or has not been fulfilled?



3. The amount now owing and the costs claimed

The amount of the decision/settlement (including costs) £

If your legislation allows you to claim interest on the amount award please complete this section.
You must show details of your calculations.

(Interest on £
from to
at %)

or

(As shown in the attached calculation) £

sub-total £

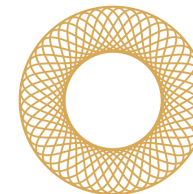
Less amount paid £

Balance remaining unpaid £

Court fee £

Solicitor's costs £

Total now owing £



5. Declaration in ACAS matters

I certify that a declaration that this sum would not be recoverable against the respondent under general law of contract has not been made and that no application for such a declaration is pending.

6. Statement of truth

Statement of Truth

I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

I believe that the facts stated in this application are true.

The Applicant believes that the facts stated in this application are true. I am authorised by the applicant to sign this statement.

Signature

- Applicant
 Litigation friend (where judgment creditor is a child or a patient)
 Applicant's legal representative (as defined by CPR 2.3(1))

Date

Day	Month	Year
<input type="text"/>	<input type="text"/>	<input type="text"/>

Full name

Name of applicant's legal representative's firm

If signing on behalf of firm or company give position or office held



Outer Temple

Thank you

Outer Temple Chambers
@outertemple.com