

5 Stone Buildings

How far is it reasonable for Trustees to use up trust assets to address data shortcomings in GMP equalisation?

Where do you draw the line?

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GMP equalisation – what needs to be done

“Dealing with GMPs will be a journey, with several stages and dependancies. Many trustees and sponsors have already completed the early stages of the journey, and the focus is now turning to planning for implementation. This will require collaboration across advisors and service providers to ensure that the right data are available, the impact of different GMP rectification and equalisation options is understood and, at the end of the process, members understand the changes being made to their benefits.”

Source : GMP Equalisation - A Once in a Lifetime Opportunity (Mercer)

What does Mercer say this means ?

- Initial advice, training
- Accounting, transfer values
- Financial impact, administration
- Complete GMP reconciliation
- GMP project initiation, benefit audit, **data gap**
- Implementation options analysis
- GMP rectification calculations, member communication
- Member consultation "(?)" GMP equalisation calculations
- Agree and implement changes, member communications
- Discussions between trustees, employers and their advisers throughout.

Source : GMP Equalisation - A Once in a Lifetime Opportunity (Mercer)

Financial impact

“Financial impact of equalisation

- Given the increase in benefits that is due to members following the requirement to equalise GMPs, it has been necessary to include the additional cost of these benefits in pension accounting figures. For around 80% of schemes, the impact of implementing GMP equalisation is likely to be relatively small, equating to **less than 1% of the schemes’ total liabilities**. Nevertheless, for around 20% of schemes the impact is likely to be larger and, for a small proportion, the increase in liability is likely to be **in excess of 3% of the scheme’s liabilities**. The outcome for any scheme is dependent on scheme specific factors including the retirement age, the pension increases and the split of scheme members between males and females.
- Whilst the scheme level impact may be small, **the impact may be much more significant at the member level.**”

Source: GMP Equalisation – what are Mercer clients doing ?

How far do trustees have to go ?

- When can trustees conclude that change to benefits does not justify the costs of computation and implementation ?
- Possibly specific to equalisation of GMPs and definitely case specific
- But what guidance can we get from law in other areas ?
- Two potential areas:
 - Trust law
 - European law

Trust law

- Trustees have to be “ready with their accounts” (see eg: Lewin 21-031)
- Failure to keep records *prima facie* a breach of trust (*Jones v Firkin-Flood* [2008] EWHC 2417 at para 231 and NSW case of *Smith v Stewart* [2000] NSWSC 1224 (especially para 48))
- So first question is whether failure to keep adequate GMP data a breach of trust
 - NB Unlikely to found claim for damages (because of exoneration provisions) but relevant to whether the trustees can rely on absence of data now.

Failure to record adequate GMP data a breach of trust ? Should trustees have been retaining adequate GMP data ?

- Equalisation of GMP has been an issue for some time (see *Marsh & Maclennan v Pensions Ombudsman* [2000] Pens LR (PO) and [2001] Pens LR 51 (HCT) nb especially para 64, 84 - 95)
- In *Marsh & Maclennan*, Rimer J left open the following question

“Does ...(the equal treatment rule)... require the equalisation of the pensions actually payable in so far as the effect of the GMP calculations results in an inequality of pension as between a man and a woman with comparable working histories?”

Failure to record adequate GMP data a breach of trust ? Should trustee have been retaining adequate GMP data ?

– Also para 88:

“I consider that the potentially discriminatory features of GMPs are matters about which scheme members are in principle entitled to raise (issues) with the scheme trustees and managers even before the potential for discrimination has become a reality.”

- Fact that trustees followed industry practice may not be a defence (cf *Edward Wong Finance v Johnson Stokes & Master [1984] 1 AC 296* (Hong Kong conveyancing case) and *Thwaytes v Sotheby's [2016] 1 WLR 2143* at para 79)).
 - But starting point will be how the trustees were advised and what they knew.
- Will answer be different for newly appointed trustee ?

How can trustee justify drawing a line under investigation ? (assuming failure to retain data is not a breach of trust)

- *Re Benjamin* jurisdiction – distribution on the basis of assumed facts
 - *Capita v Gellately* [2011] Pens LR 153 at para 1(d) and 92 (Sea Containers – BR members)
 - *Axminster Carpets* [2021 EWHC 1652 per Morgan J at para 32ff

“32. On such an application, the court has regard to the evidence which exists as to relevant facts and matters. The court requires the evidence to show a high degree of likelihood of the existence, or non-existence, of the facts material to that footing and it also looks at matters in a practical way. The purpose of such an order is not to relieve the Trustee of any and all difficulties which might arise in the administration of a trust. Instead, the court balances any potential unfairness to beneficiaries against the real need to allow the trust to be administered without putting the Trustee to difficulty and expense which will probably not benefit anyone.”

How can trustee justify drawing a line under investigation ?

- Classic role of *Benjamin* orders is prior to final distribution
 - Cf “failed” investment fund cases (*Pritchard Stockbrokers* [2019] EWHC 37, *Allanfield Property Services* [2016] Lloyd’s Rep IR 217, *MF Global UK* [2013] 1 WLR 1374 (para 25ff), *World Spreads* [2016] 1 BCLC 162, *Supercapital Ltd* [2021] BCLC 355)
- Protects trustee against breach of trust claim when parting with capital – does not affect rights of beneficiaries *inter se*
 - (but contrast *Alpari* order in investment fund context (see para 18 of *Pritchard Stockbrokers*))

Re Benjamin considerations

- Norris J in *Re Pritchard Stockbrokers Ltd* [2019] EWHC 37
“26. In providing guidance to the administrator the Court will always be concerned to see
(a) the exact nature and scale of the problem facing the special administrators in relation to a final distribution by the trustee company of the client money it holds on trust;
(b) the precise steps which the joint administrators have caused the company to take in order to identify clients and quantify individual claims, and what the results are;
(c) that **every reasonable step** has been taken to effect a distribution to each of those entitled having regard to (i) **the size of the claim** (ii) **the cost and difficulty of investigation** (iii) **where that cost burden falls** and (iv) the need to ensure the return of client assets to all clients as soon as reasonably practicable (so that a distribution notwithstanding imperfect knowledge is the appropriate course);
(d) the details of the proposed distribution mechanism and what steps are to be taken in relation to those who will not receive a distribution;.....”

Is the position changed by European Law ?

- *Benjamin* orders *prima facie* available in relation to equalisation obligations eg *Capita v Gellately* BR members (?)
- Equalisation obligation *prima facie* subject to the “minimum interference” principle
 - “The court should, where possible, give effect to Barber rights by adhering to the provisions of the relevant scheme where it is possible to do so in preference to some other approach. If some departure is required, it should in general, so far as practicable, represent the minimum interference with the scheme provisions.” per Arden LJ in *Foster Wheeler v Hanley* [2009] Pens LR 229 at para 33
- Does this mean that the data position for disadvantaged members has to be the same as for their comparators ?
 - nb that “the solution that is most practical from the point of view of administration by the trustees” is not the appropriate course (para 32)

Benjamin Order GMP equalisation

- *Prima facie* available for final distributions
 - Permission to distribute on the basis of assumed facts
- Two issues
 - Distribution without an order ?
 - Available for continuing schemes ?
 - (ie Permission to administer on the basis of assumed facts ?)

Distribution without an order ?

- Default position
- When will you not need an order ?
 - When it is clear that “*every reasonable step*” has been taken ? (cf *Pritchard Stockbrokers* at para 26(c))
 - When the trustees’ view that “*every reasonable step*” has been taken is clearly a reasonable one ?
 - Answer likely to be clearer for final distributions than continuing funds
 - What is reasonable may change over time

Order available for continuing schemes ?

No

Cost of investigation will fall onto the company, rather than reduce fund available for distribution.

Trustee may be criticised for failing to retain adequate data

Trustee is not parting with fund and *Benjamin* order would not extinguish rights of member, so member can still claim his entitlement from the fund after the order (if member can prove what it is).

Yes

Costs of investigation may reach a stage where costs are not reasonable in the light of the sums involved

Failure to retain adequate data may tend to be excusable and unlikely to be culpable.

Trustee could be given permission not to make further investigations if not cost effective. Trustee will revert if further information arises.

Order available for continuing schemes ? (ii)

No

Has “*every reasonable step*” really been taken ? – what is reasonable is likely to be alter over time

The benefits of some members may be changed substantially by GMP equalisation

Yes

“*every reasonable step*” must mean reasonable in the context of the cost of investigation. This is likely to be predictable now.

The benefits of most members will not be changed substantially by GMP equalisation



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