

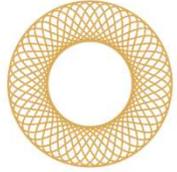
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# **White Paper Talk**

## **Correction Exercises**

What are the unresolved issues over benefit arrears and correction exercises including limitation forfeiture and payable interest, supported by case law and practical examples?

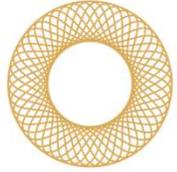
Thursday 10<sup>th</sup> October 2024  
David E. Grant KC



# The prevalence of benefit payment issues – & the need for correction

*"Art is rearranging and grouping mistakes"* (Don Van Vliet)



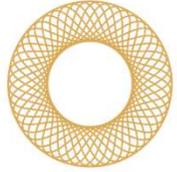


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# **Underpayment scenarios**

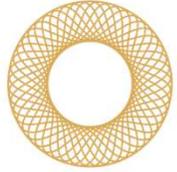
- Formal invalidity & ineffective amendments
- Supervening illegality
- Wrongful administration of rules
- Any other?
  
- Be wary of underpayment becoming overpayment



# Settled issues save for CA intervention

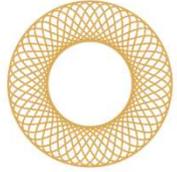
*"There is nothing more deceptive than an obvious fact"*

- s21(1)(b) Limitation Act applies – at least in ordinary cases
- Interest at 1% above base – invariable?
- Sir Paul Morgan will hear no more cases



## Settled issues – limitation

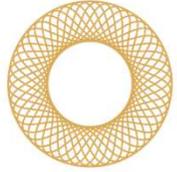
- Where historical under-payment or transfer under-calculated, claims within s21(1)(b) Limitation Act, as opposed to s21(3)
- In consequence no limitation period applies
- See *Lloyds 1* at [437] *Lloyds 3* at [381] and *Axminster* [156]



## Settled issues - interest applicable

*"it has long been an axiom of mine that the little things are infinitely the most important"*

- Interest in equity
- Purpose of interest -compensation [337]
- Choice in *Axminster* between 1% or 2% above base rate [341]
- Decision - 1% above base [341]

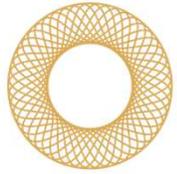


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# Unresolved issues

1. Duty to investigate
2. Introduction of forfeiture provision
3. Construction of clause
4. What constitutes a claim and standstill agreements
5. Transfers out
6. Transfers in
7. Where cohort excluded from membership of scheme
8. Compromise

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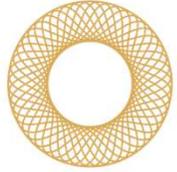


# 1: Duty to investigate?

- Is there an obligation to rake over instruments post *Gleeds & Virgin* etc?

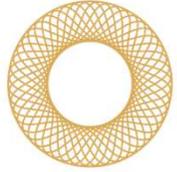
*Apparently the fact that you needed to know was not known at the time the now known need to know was known*





## 2: Is it a valid exercise of the PoA to introduce a forfeiture provision?

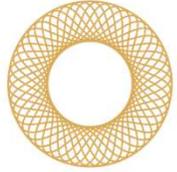
- See *Axminster* [218]-[221]
- Any impact of *BBC*?
- Prospect of challenge?



### 3. When is a clause a forfeiture provision?

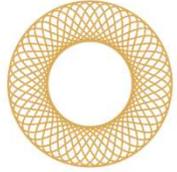
- Question of construction
- Limited relevance of familial terms. See *CMG* [74]-[75], *BBC* [29]
- Absence of word “forfeit” or cognates is not determinative – see Rule 5.11 in *CMG*
- Relevance of archaeology – cf *CMG* and *BBC*

*“There is a strong family resemblance about misdeeds”*



## 4. What constitutes a claim & impact of standstill agreements

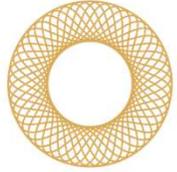
- A member's lack of knowledge will not stop time running
- Was this what Parliament envisaged when s92 was passed?
- Clear ability of trustee to enter into standstill agreement with employer pending complex litigation



## 5. Transfers out – variants

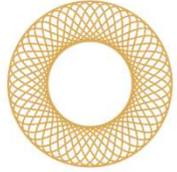
See *Lloyds 3* [234]

- (i) the Trustee does not make a top-up payment;
- (ii) the Trustee makes a top-up payment to the original receiving scheme even though the transferring member is no longer a member of that scheme;
- (iii) the Trustee makes a top-up payment to the member's current scheme or most recent scheme or pension arrangement;
- (iv) the Trustee makes a top-up payment to the transferring member direct;  
or
- (v) the Trustee provides a residual benefit to the transferring member.



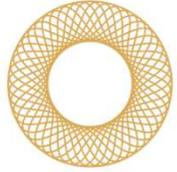
## 6: Is the obligation to pay additional benefits applicable to transfers in?

- What is a transfer in and how is it calculated?
- Arguments for and against a transfer in being subject to requirement to top up



## 7: Cohort excluded

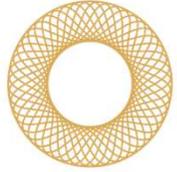
- What if the amendments in *Newell* had not been valid so that there was no valid benefit conversion?
- Does it depend whether the cohort is offered membership of a new scheme or provided different class of benefits within a new section of the same scheme?



## 8: Compromise

*"Compromise is the devil talking"*

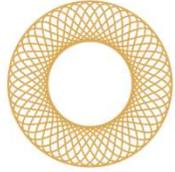
- What form can the compromise payment take?
- What if the scheme has been bought out before the issue is spotted?
- Will there be Revenue consequences if the compromise benefit is not something which could have been paid under the Scheme?
- Can the payment be reshaped, e.g. where Revenue limits are or might be breached?



# What does the future bring?

- Prospect of judicial challenge to *Lloyds*?
- DWP intervention re s.37?
- What is the next issue to rival *Barber* and s.37?
- Do we have enough already on our hands?

*It is a capital mistake to theorize before you have all the evidence. Its biases the judg[e]ment*

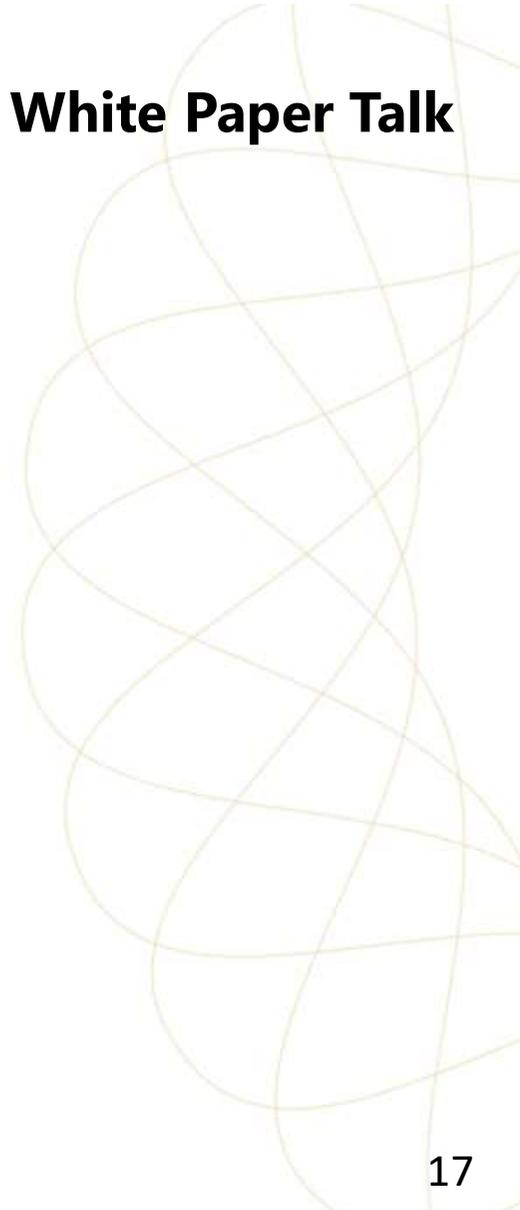


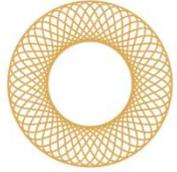
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# Questions?



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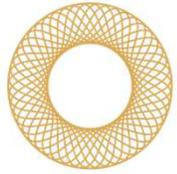
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## Takeaway points

*Depend upon it there comes a time when for every addition of knowledge you forget something that you knew before.*

*It is of the highest importance, therefore, not to have useless facts elbowing out the useful ones.*



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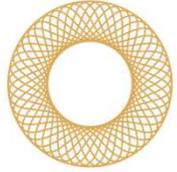
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**Thank you**

David E. Grant KC

[David.GrantKC@outertemple.com](mailto:David.GrantKC@outertemple.com)

+44 (0) 207 353 6381



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- *BBC v BBC Pension Trust Ltd* [2024] EWCA Civ 767