

5 Stone Buildings

Hard to reach members

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Hard to reach members – a type of problem

Issue highly sensitive to context, but:

Scheme buyout

- No contact with deferred member / pensioner
- Know they have rights
- What can/should you do ?

Bill of fare

- Law on provision of information
- Law on distribution by trustees
- Forfeiture clauses (but see KR's talk afterwards)

Disclosure Regs (2013/2734)

Some types of hard to reach members are outside the scope of some of the disclosure requirements

Reg 24 (during wind up) and reg 25 (after wind up) provide for extensive provision of information by trustees to members.

But does not apply to "*excluded person*"

Disclosure Regs (2013/2734) (ii)

Reg 1

“*excluded person*” means a member or beneficiary—

- (a) whose present postal address and electronic address is not known to the trustees or managers of the scheme, and
- (b) in respect of whom the trustees or managers of the scheme have sent correspondence to their last known— (i) postal address and that correspondence has been returned, or (ii) electronic address and the trustees or managers of the scheme are satisfied that correspondence has not been delivered;

Disclosure Regs (2013/2734) (ii)

Excluded persons are also excluded in relation to:

- material alterations to basic scheme info (reg 8: 8(3))
(nb presumably would not have been excluded person when became member so not excluded from obligation to provide basic scheme info (reg 6))
- summary funding statements (reg 15: 15(2)(a))
- Information about money purchase benefits (reg 17: 17(1)(b))
statements of DB and cash balance benefits only need to be provided on request (reg.16: 16(b) and 17:17(1)(b))

Disclosure Regs (2013/2734) (iii)

BUT Excluded Persons **not** excluded from trustees' obligation to provide information about:

- Lifestyling (reg 18)
- Rights to flexible benefits (if they have them) (reg 19)
- "Second information on accessing benefits" (reg 20)
 - the amount of payment and whether can be altered
- Changes to benefits (reg 22)

AND dependents of excluded person not excluded in relation to death benefits (reg 21)

IE not excluded from scope of obligation at and immediately before retirement

Obligation of trustees to inform beneficiaries at common law

- In equity, trustees are certainly under an obligation to inform beneficiaries of their rights when the rights vest
Lewin 21-008 and see *Brittlebank v Goodwin (1867) LR 5 Eq 545 at 550 Re Emmett (1881) 17 ChD 142 at 149* (enhanced interest for failing to inform)
- And to pay income whether or not demanded (*Hawkesley v May [1956] 1 QB 304 at 325*)
- Possibly also under an obligation to take reasonable steps to inform adult beneficiaries of contingent interests
Lewin 21-009 and see *Lightman [2004] PCB 23 at 24*

Failing to keep in contact with beneficiaries

- Identifying beneficiaries part of the trustees' obligation ? (by analogy with executors – see eg *Re Vincent [1909] 1 Ch 810* but contrast *Re Lewis [1904] 2 Ch 656*)
- Could failing to keep in contact be a breach of trust ?
 - Claim against trustee in breach of trust ?
 - Inappropriate for trustees to rely on a forfeiture clause ?
 - Relief from forfeiture/relief from penalty ?

Relief from forfeiture – *obiter* in *Axminster*

“259There are many examples of relief from forfeiture being granted to a party who has been at fault but where an unrelieved forfeiture would be disproportionate to the fault. It can be said that if a court of equity is ready to grant relief from forfeiture in such a case, **it would be even more ready to grant relief from forfeiture where the rights holder was not at fault in any way and where the party claiming the forfeiture is itself open to criticism.** Indeed, in such a case, a court might take the view that relief from forfeiture should be the obvious outcome unless there are some compelling reasons to the contrary.” per Morgan J

Distribution - can you ignore the claims of excluded persons?

“Many of the outstanding individual claims are so small that the view may properly be taken that the unpursued claims are abandoned. In relation to claims of more substance the view may properly be taken that the need for finality is much greater than the need to preserve hitherto unpursued claims. Those who now receive a final distribution are entitled to regard it as their own (and not exposed to some claim to follow or trace into it by a hitherto unresponsive client). It is undoubtedly time for the book to be closed.”

per Norris J in *Re Pritchard Stockbrokers [2019] EWHC 137* (#29)

Can you ignore the claims of excluded persons ?

- But orders in Pritchard based on direction for scheme of distribution by the FCA so not a simple question of trust law – no statutory equivalent in pension law.
- Could this ever apply to a pensions case ?

Provision for uncommunicative members

What provision do trustees need to make for uncommunicative members ?

s.27 Trustee Act 1925 notices do not apply to known claims (see 27(2))

Transfer risk to replacement pension provider ?

Set aside fund ?

Otherwise breach of trust without a *Benjamin* order ?

What might a court authorise on a *Benjamin* order ?

Guide to what is permissible without an order ?

Distribution – can you ignore “excluded persons” ?

What would happen if you went to court ?

- *Benjamin* jurisdiction allows trustees to distribute on the basis of a disclosed factual assumption (see eg *Axminster [2022] Pens LR 1 #32* and 39-46, *Capita v Gellately [2011] Pens LR 153 #92* (and see #1(b) and 7)
- Effect of the order is that the trustee cannot be liable in breach of trust for distributing on basis of assumption.

Distribution – Benjamin orders

BUT

- What would the factual assumption be ?
- Does not affect proprietary rights – ie interest of “excluded person” is not destroyed by order (cf *Axminster #32*) (contrast *Pritchard*)

NB *Pritchard* is a case of a finite pot.

How would uncommunicative member be left post *Benjamin* order ?

- No money left in hands of trustee
- Money in hands of third party (eg annuity provider)
- Possible to recover from sponsor ? - but only if solvent
- Trustee not acting in breach of trust (if order granted)
- Difficult for excluded person to recover from members themselves.

Difficult for uncommunicative member to recover from members themselves

Practical difficulties in tracing members

Change of position defence in relation to monies already received by members

Defence may also apply in relation to monies yet to be received (“anticipatory reliance” - see eg *Scottish Equitable v Derby* [2001] Pens LR 163 #26 and *Dextra Bank v Bank of Jamaica* [2002] 1 All ER 193 #46)

nb these arguments could equally have applied to the claims of the uncommunicative creditors in *Pritchard*

Limited scope to attach to members' annuity rights

Provision for uncommunicative members

So what could trustee do without an order ?

- Security with third party provider

- Set aside fund (but will fund be adequate)

- Rely on solvent employer

 - Will the employer be solvent when the member surfaces ?

 - Breach of trust ?

- Can the trustee rely on forfeiture provisions ?

 - Only applies to past payments

 - Is the clause a forfeiture clause at all ?

Where fund is finite apply to court ?

Forfeiture clauses

Is your clause a forfeiture clause ?

Re Axminster Carpets Group Retirement Benefits Plan [2022] Pens LR 1

CMG Pension Trustees v CGI IT UK [2022] EWHC 2130

Rights of “excluded persons” – forfeiture clauses Axminster

25. Power To Apply Unclaimed Monies

ANY monies payable out of the Plan and not claimed within six years from the date on which they were due to be paid may (at the Trustees' discretion) be applied:-

- (i) in augmenting the benefits of those Members still in Service;
 - (ii) in reducing the Employer's contributions to the Plan, or
 - (iii) in payment of the expenses of the management and administration of the Plan.
- (para 168)

Rights of “excluded persons” – forfeiture clauses Axminster

No clear words of forfeiture (#175) (and nb that deed in Axminster did include the word “forfeiture” in another clause)

Clause gives options for to how the monies may be used until claimed (#176) – ie clause does not direct how the monies should be used

NB that issue in Axminster arose in the context of underpayments of which the members were unaware – Morgan J says argument would have been more attractive if limited to missing beneficiaries (see #176)

Rights of “excluded persons” – forfeiture clauses CMG

Supposed forfeiture clause2000 Deed

5.11. Benefit forfeiture

Notwithstanding Schedule II if a benefit or instalment of benefits is not claimed by or on behalf of the person entitled to the benefit or instalment in accordance with these Rules within 6 years of its date of payment it shall be retained by the Trustees for the purposes of the Scheme"

Para 46 – nb deed included an “ignore headings”
clause

Rights of “excluded persons” – forfeiture clauses CMG

Previous Deed

“20.2 Benefit Forfeiture

Notwithstanding Rule 24 if a benefit or instalment of benefit is not claimed by or on behalf of the person entitled to the benefit or instalment in accordance with these Rules within 6 years of its date of payment it shall be retained by the Trustees for the purposes of the Fund.”

para 31 – nb deed did not include an “ignore headings” clause

Rights of “excluded persons” – forfeiture clauses - CMG

- “.....**shall** be retained for the purposes of the Scheme.....” is equivalent to forfeiture (#94) (nb contrast with “**may** be applied” for specific purposes in *Axminster*)
- “Archaeology” supports this conclusion (#96)
 - cf argument at *Stena v MNRPF [2011] Pens LR 233* at #34 – did parties intend to change anything (and cf *Univar [2020] Pens LR 23* at #236-239)
 - Headings in 2000 deed not relevant to construction of the clause because of “ignore headings” clause (#73),

BUT headings of clause in previous deed are relevant because previous deeds did not include “ignore headings” clauses (#96(2)- 97)

Conclusion on forfeiture clauses

- If you don't have the word "forfeit" or equivalent in the clause, it may be difficult to assume that a judge will conclude that the clause effects a forfeiture
- Clauses which make a direction rather than provide for a discretion are likely to be stronger candidates for forfeiture
- Archaeology may be critical

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Thank you,
any Questions?

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