

In light of recent case developments, what are the unresolved issues over benefit arrears and correction exercises, particularly concerning limitation, forfeiture and payable interest?

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- *Lloyds Banking Group Pensions Trustees Ltd. v Lloyds Bank PLC* [2019] Pens LR 5 (“Lloyds 1”)
- *Lloyds Banking Group Pensions Trustees Ltd. v Lloyds Bank PLC* [2021] Pens LR 10 (“Lloyds 3”)
- *Punter Southall Governance Services Ltd. v Hazlett* [2022] Pens LR 1 (“Axminster”)
- *CMG Pension Trustees Ltd. v CGI IT UK Ltd.* [2022] EWHC 2130 (Ch) (“CMG”)

## **Possibly also:**

- *Newell Pension Trustees Ltd. v Newell Rubbermaid UK Services Ltd.?*
- Argument concluded on Thursday of last week: substantive issues concern a *Re Courage* proviso and possible age discrimination
- Potential underpayment issues depending on outcome

# Limitation

- *Lloyds 1* and *Axminster*: pensioners historically underpaid
- *Lloyds 3*: past transfer payments historically under-calculated
- Morgan J. held that member claims fell within LA 80 section 21(1)(b) to which no statutory period of limitation applied
- In *CMG* and *Newell Trustees* limitation was not argued

## **LA 80 section 21:**

### ***21 Time limit for actions in respect of trust property.***

*(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—*

*(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*

*(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.*

...

*(3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.*

- Morgan J. held in *Lloyds 1*, *Lloyds 3* and *Axminster* that members' claims fell within section 21(1)(b) rather than section 21(3)
- Language dates back to 1888 but not previously subject of reported authority
- Went largely unremarked in published texts on both trusts and limitation until the *Lloyds GMP* litigation.

- *Axminster* did not deal with transfers
- Could invite a different 1st instance judge not to follow *Lloyds*
- Is a requirement the trustee make good deficiency in original transfer payment “*an action by a beneficiary to recover trust property*” per LA 80 section 21(1)(b)?

## Some unanswered issues here:

- Are *Lloyds 1* and *Axminster* correct on construction of LA 80 section 21(1)(b) to past underpayments? Settled below CA level.
- How does this reasoning apply to former trustees? Morgan J.'s "*tentative*" observation at §§160 and 305 that they do get the benefit of s. 21(3) as they are no longer in possession of trust property
- Some practical difficulties of *Lloyds 3*
- Brexit

## ***Lloyds 3***

- Paradigm case of an under-calculated transfer payment where member remains a member of the receiving scheme
- Other scenarios postulated in *Lloyds 3*:
  - receiving scheme unwilling to accept a top-up
  - receiving scheme has been wound up and no longer exists
  - receiving scheme is willing but the member has moved on
  - member's new scheme is willing to accept a top-up

*"The outcome in a particular case would therefore seem to turn on what the parties might agree, or what a court might order, in those circumstances. It seems likely that if those circumstances did arise in a particular case, the parties would agree on a solution to the difficulty. It seems likely that a member would be prepared to agree a solution under which he received something of benefit and the solution would be influenced by the preferences of the individual member rather than by any result which is mandated by the cash equivalent legislation."* (§236)

and

*"I can comment that if a transferring member brought proceedings and established that the Trustee had made an inadequate transfer payment in the past, the court would be reluctant to hold that supervening events meant that the Trustee was no longer obliged to make any payment to anyone."* (§240)

- Trustee's power of compromise under Trustee Act 1925 section 15(f) might be a suitable route by which to achieve the sort of solution the judge had in mind?
- Relevant accretion under Registered Pension Schemes (Authorised Payments) Regulations 2009 S.I. No. 1171 regs 6 and 7 if (inter alia) (i) post-5 April 2006 transfer and (ii) value less than £10,000

(Although technically inconsistent with judge's finding in *Lloyds 3* that member did not retain a residual benefit)

# Brexit

- How did limitation arise in *Lloyds 1*?
- Equality Act 2010 section 134(3):
  - Court cannot make an award in respect of arrears of benefits in respect of a time before the “*arrears day*” (“*The day falling 6 years before the day on which the proceedings were commenced.*”)
- Section 134 disapplied by the application of the EU law principle of equivalence
- Judgment given in October 2018, before the UK left the EU on 31 January 2020
- Point did not arise in *Axminster* as not an equal pay claim

## **Does Brexit make a difference?**

- EU (Withdrawal) Act 2018 (“Withdrawal Act”)
- Retained EU Law (Revocation and Reform) Act 2023 (“Revocation Act”)
- Principle of equivalence a general principle of EU law arising under EU Treaties

## Withdrawal Act 2018

- *Prima facie* general principles are preserved by s. 4(1)
- Sect. 4 however subject to Schedule 1, para 3(2), preventing disapplication or quashing of any enactment after IP completion day, 31 December 2020, because inconsistent with any general principles of EU law
- Schedule 1 itself subject to carve outs in (relevantly) Schedule 8 para 39(3) and (5).

- *Beattie v. 20-20 Trustee Services Ltd.* [2023] Pens. L.R. 3: only get within the exception to the exception at para. 39(3) if proceedings started before IP completion day
- Further exception to the exception at para 39(5) did not assist in *Beattie*
- *Newell Trustees* – challenging that construction of para 39(5)
- 3 year window under Schedule 8 para 39(5) will very shortly close

## Revocation Act 2023

- Sect. 2(1) – s. 4 of the Withdrawal Act repealed “*at the end of 2023*”
- Sect. 4 “*Abolition of general principles of EU law*”
- Sect. 4(7) amends Withdrawal Act Sch. 8 para. 39 by, effectively, removing sub-paras. (3) and (5).
- Sect. 22(5) – “*Sections 2, 3 and 4 [of the Revocation Act] do not apply in relation to anything occurring before the end of 2023*”
- Sect. 2 in force but ss. 4 and 22 are not yet

- Explanatory Notes, para 247, say this about s. 22(5):

*"Subsection (5) and (6) are saving provisions that provide that section 2 to 4 (assimilation of retained EU law) and the changes made by Schedule 2 ("Assimilated law": consequential amendments) do not apply in relation to anything occurring before the end of 2023. The principle of supremacy, retained general principles and the references to "retained EU law" etc. will continue to apply to things occurring before that date, and to any legal proceedings relating to them after that date."*

# Forfeiture

- PA 95 s. 92(5), which permits forfeiture:
  - “... by reference to a failure by any person to make a claim for pension —
  - ...
  - (b) where the claim is not made within six years of the date on which the pension becomes due.”*
- Sect. 94(2):
  - “ *“pension” ... includes any benefit under the scheme and any part of a pension and any payment by way of pension*”.

- Value of reported cases addressing differently drafted rules?
- *CMG* at §74:

*“It is trite law that the Court’s construction of one document is not binding authority in relation to the construction of another. But the way in which one judge has construed a provision (or, indeed, the general approach which he or she has adopted to construction) may provide real assistance to Courts faced with a very similar exercise.”*

# Construction of forfeiture rules

- *CMG* forfeiture rule:

*"... 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."*

## Seven points:

- Court will not adopt a strained construction to reach member-friendly result
- Likely to be construed as applying to a partial underpayment – not limited to entirety of a benefit or entirety of an instalment
- Knowledge, or lack of it, by the member is irrelevant: no implied term time will not start running until member knew or ought reasonably to have known of the underpayment
- A “*claim*” does not mean commencement of proceedings, but ordinarily must follow unpaid benefit falling due (unless a “*continuing claim*”)
- “*failure*” in s. 92(5) does not denote fault by the member
- Administrative arrangements putting pension into payment when member retires will not suffice: a demand or assertion of a right
- Retention “*for the purposes of the Scheme*” does not enable forfeited benefit nevertheless to be paid.

# Uncertainties

- Might CA philosophically take a different view?
- Introduction of a forfeiture rule: Occupational Pension Schemes (Modification of Schemes) Regulations 2006, S.I. No. 759, reg. 3:

*For the purposes of section 67(3)(b) of the 1995 Act, the prescribed manner of the exercise of any modification power in relation to a scheme to which the subsisting rights provisions do not apply, is any modification of a scheme—*

...

*(b) which provides for any or all of a member's or survivor's subsisting rights to be forfeited provided that a modification in such a manner is not prohibited under section 92 of the 1995 Act (forfeiture), any other enactment or other rule of law;"*

## Uncertainties (cont.)

- But is introduction prevented by the terms of a scheme's PoA?
- What if the rule is discretionary?
- Non-application to under-calculated transfer values (*Lloyds 3*)

## Scheme's PoA:

- Only authority is *Axminster*
- *Re Courage*-type proviso prohibiting amendments which “*would diminish the benefits ... already accrued*”
- Introduced rule providing for automatic forfeiture but giving trustees a unilateral discretion to relieve against forfeiture
- Introduction permissible because (i) amount of member's benefits remained unchanged/not diminished, and (ii) forfeiture only applied where member failed to claim benefit, and could not be said that this “*would*” happen
- Might have added that power to relieve against forfeiture also meant that “*would*” test was not satisfied
- Places a premium on the language used in any proviso to a scheme's PoA
- *Re Courage* - must not “*vary or affect any benefits already secured by past contributions*”
- *IMG* - “*no amendment shall have the effect of reducing the value of benefits secured by contributions already made*”

# Discretionary forfeiture rule

- Whose discretion?
- Judge in *Axminster* sympathetic to members
- But rejected argument that discretion could only be exercised in one way and perverse not to relieve against forfeiture

## **Under-calculated transfer values: two examples from *Lloyds 3***

*“No beneficiary shall be entitled to claim any instalment of pension or other benefit to which he is entitled under the Scheme more than 6 years after that instalment has fallen due for payment.”*

And

*“If any pension or benefit or any instalment remains unpaid to and unclaimed by the person to whom it is payable for a period of six years from the date it became payable, then the entitlement to it shall be extinguished and it shall be retained by the Trustees in the Fund.”*

# Interest

- *Axminster* and juridical basis
- In all four cases simple interest and 1% over base
- Arguments advanced in those cases re-run in *Newell Trustees*
- Employer argues for base rate only: Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, S.I. 2475, at reg. 6
- RB contends for the option of a “rate” reflecting investment return earned by scheme on its assets over relevant period

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