Linklaters

Pensions Case Law
Update

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Welcome

This is the Linklaters Pensions Dispute Resolution Group's Case Law Update.

The aim of this publication is to provide a look back and commentary on recent cases that have come before the courts and to look ahead to some of the key decisions on the horizon.

Please do not hesitate to get in touch if you would like to discuss any of the issues mentioned below or indeed any contentious issues on which the Linklaters Pensions Dispute Resolution Group may be able to assist.

Mark Blyth
Partner, Pensions Dispute Resolution Group

Commentary

Granada UK Rental & Retail Limited & Ors v The Pensions Regulator (the “Box Clever” case)

Key points:

> The Upper Tribunal “**UT**” can allow TPR to raise new arguments which were not included in the Warning Notice having regard to requirements of fairness.

> The UT will finally hear the reference almost 12 years after commencing its investigation.

TPR’s moral hazard investigation into the Box Clever Group Pension Scheme began in 2006. In 1999/2000, a joint venture was set up between two companies, Granada (now ITV) and Thorn. After the joint venture failed and the principal employer became insolvent in 2011, TPR issued a Warning Notice seeking to impose a Financial Support Direction (“**FSD**”) against target companies in the ITV group. After the Determinations Panel of TPR issued an FSD against certain Granada companies, the targets of the FSD referred the decision to the UT.

Before the UT, the targets argued it was “common ground” that there had been no misconduct in their dealings and that the Box Clever venture had been carried out on commercial arm’s length terms after extensive due diligence. This claim relied on statements by TPR and the Determinations Panel that they did not rely on any allegations of misconduct of this sort in their case. TPR said that there was no such common ground, made some additional points in reply and reserved the right to make further submissions.

“The Court of Appeal allowed the appeal and stated that the UT should apply the correct test in considering the admission of new arguments.”

The targets said that these submissions were a radical departure from TPR’s original case and applied to strike out these disputed areas of TPR’s reply. The UT found in favour of TPR and the targets subsequently appealed to the Court of Appeal. The Court of Appeal allowed the appeal and stated that the UT should apply the correct test in considering the admission of new arguments. The UT has a discretion to allow TPR to raise a new case. It is a “de novo” jurisdiction which is not constrained by the arguments made before the Determinations Panel. The constraints on the UT’s jurisdiction are public law and common sense obligations to act fairly. It is for the UT to decide whether any new case not contained in the Warning Notice should be allowed, having taken into account all relevant factors. The case was sent back to the UT for the strike out application to be considered again in light of the Court of Appeal’s guidance.

Back in the UT, the targets argued that TPR had failed to make any written application for permission to raise new arguments. Even if a written request had been made, it ought to have been refused because it was made too late. TPR argued that the parts of the Warning Notice to which the targets took exception were not new arguments at all. TPR had not changed its arguments - it was simply countering the targets’ “Pandora’s box” of assertions designed to show that Granada’s actions were beyond reproach.

The UT held that some features of TPR's case were indeed new, in the sense that they were not included in the Warning Notice. However, in the particular circumstances of this case, there was no requirement for a written application to advance the new points and the targets were not prejudiced in any sense by the absence of any formal written application. The relevant factors for the UT to consider included whether the new allegations were set out with sufficient detail, whether the targets would be able to deal with them and whether TPR or the trustee was guilty of any culpable delay, such that they should not be allowed to rely on the new allegations. On each of these points, the UT found in TPR's favour.

The mere fact that TPR was not making allegations of impropriety in its case did not equate to an acceptance that no impropriety occurred. The new arguments were a legitimate response to the targets' attempts to make a virtue out of points on which TPR said it was not relying.

The UT substantive hearing is listed for January 2018.

Is shareholder approval needed for security arrangements for a SUURBS?

Key points:

> Security arrangements for a SUURBS do not need shareholder approval.

> Where a trustee holds security in relation to the SUURBS, it is held on trust as the trustee of a pension scheme.

The Court of Appeal recently dismissed an appeal against the 2015 High Court decision in the Granada case. The case (unrelated to the Box Clever case) concerned a secured unfunded unapproved retirement benefit scheme ("**SUURBS**"). The Finance Act 1989 introduced an "earnings cap" which limited the amount of earnings which could be used for calculating the benefits of members who joined a pension scheme after 1 June 1989. Companies wishing to continue to provide pension benefits to their high earning executives based on employees' full salaries, commonly put unapproved pension arrangements in place known as "top-up" arrangements.

Granada had set up a SUURBS in 2000 for the benefit of some of its executive directors. This was set up under trust as a pension scheme, with Law Debenture as trustee. The trustee was granted a charge over securities which could be enforced if Granada failed to pay the promised top-up pensions.

In 2014 Granada sought a declaration that the SUURBS was voidable because shareholder approval had not been obtained under s.320 of the Companies Act 1985. It argued approval was needed because the security arrangement involved the acquisition of a "non-cash" asset. At first instance, the judge held that the arrangement was valid and shareholder approval was not required.

On appeal, Granada's primary argument was that the acquisition of rights under the pension scheme was a non-cash asset. In particular, it argued that although the directors had no legal or equitable proprietary interest in the gilts over which the charge had been granted to the trustee, the definition of "non-cash asset" was sufficiently broad that it included any economic or financial interest or advantage. In the alternative, Granada argued that the rights acquired by the directors as members of the scheme to compel the trustee to administer the trust were "rights over" the gilts.

> "interest in property"... meant a proprietary interest which can be legally enforced rather than a mere financial advantage.

The Court of Appeal held that Granada's primary argument placed too much weight on the word "interest" in the definition of "non-cash asset". Read in full, the definition of "non-cash asset" included an "interest in property", which meant a proprietary interest which can be legally enforced rather than a mere financial advantage. In relation to the alternative argument, the judges held that the rights of beneficiaries under a trust are rights against the trustee not rights over the trust assets. Those rights are not acquired "from the company" and so do not fall within s.320.

The Court also noted that if Granada's arguments were correct it would defeat the ostensible purpose of the pension scheme exemption and render parts of the legislation redundant, which could not have been Parliament's intention.

They also went on to confirm that the trustee held the security on trust acting as trustee of a pension scheme.

Linklaters acted for Law Debenture in this case.

Can a trustee in bankruptcy force a bankrupt to drawdown his personal pension?

Key points:

> A trustee in bankruptcy cannot force a bankrupt to drawdown his personal pension, even if he is eligible to receive it.

> Undrawn pension arrangements will not form part of a bankrupt's assets for the purposes of the bankruptcy.

After several conflicting first instance decisions on pension rights in bankruptcy, the Court of Appeal has provided helpful clarity over this area of law. The Court of Appeal upheld the first instance decision covered in our Summer 2015 edition that excluded the bankrupt's undrawn pension from his income assessment for bankruptcy purposes.

The appeal brought by the trustee in bankruptcy raised two main arguments:

– As the bankrupt had a contractual right to take his personal pension, the pension rights counted as "income" to which he was entitled for bankruptcy purposes. The trustee argued that this meant it could access these funds.

– The trustee could compel the bankrupt under the Insolvency Act 1986 to do all acts the trustee reasonably required in relation to its bankruptcy duties. The trustee argued this power allowed it to request the bankrupt to drawdown his pension so that the trustee could then access this money in two stages.

The court rejected both these arguments.

On the first argument, the court said that a contractual right to drawdown was not the same as an actual entitlement, and a pension that was not in payment could not be considered to be such an entitlement.

On the second argument, the court said that the legislation expressly excluded certain types of property from a bankrupt's estate. The court said that allowing a trustee in bankruptcy to force a bankrupt to make available his protected pension income as a way of getting round these exclusions would be to "drive a coach and horses" through the statutory protection offered to bankrupts.

As a result of this decision, it is now clear that where a pension is not in payment, it will not form part of the bankrupt's assets over which the trustee in bankruptcy has access.

"It is now clear that where a pension is not in payment, it will not form part of the bankrupt's assets over which the trustee in bankruptcy has access."

When does the limitation period stop running on an overpayment case?

Key points:

> In overpayment proceedings, the limitation period will stop running when the trustee responds to an Ombudsman complaint from the member.

> This is the closest equivalent to the issuing of a claim form in court proceedings, which would be the other option to stop the limitation period running.

“This decision introduces further uncertainty for trustees in establishing when a limitation period has stopped running.”

In *Webber v Department for Education*, further consideration has been given to limitation periods in the context of recovery of overpayments. The court decided in this case that the limitation period in a Pensions Ombudsman dispute should be calculated from the date the trustee formally responded to the member's Ombudsman complaint, rather than the date it first asked the member to repay an overpayment.

The trustee of the Teachers' Pension Scheme overpaid Mr Webber's pension from April 2002. The trustee discovered the mistake and wrote to Mr Webber in November 2009 asking him to repay the overpayments. Mr Webber complained to the Ombudsman in April 2011. The trustee wrote to the Ombudsman opposing the complaint and re-asserted its claim for recovery in December 2011. The Ombudsman decided in favour of the trustee and ordered Mr Webber to repay all of his overpaid pension.

Mr Webber appealed, arguing that part of the overpayment claim was out of time.

At the initial hearing, the judge said that the trustee could have discovered its mistake earlier with reasonable diligence, so the trustee was only entitled to recover up to six years' worth of overpayments from a relevant "cut-off" date. The judge asked the parties to agree between themselves what the "cut-off" date was, but indicated that he thought it should be the date which was most comparable to the trustee issuing a claim form in Court proceedings, which was likely to be the date Mr Webber complained to the Ombudsman.

The parties could not agree on the "cut-off" date so the Ombudsman reconsidered the matter and decided it was the date of the trustee's November 2009 letter to Mr Webber, as it was the first time the trustee had asked for repayment.

Mr Webber appealed the Ombudsman's decision. The Court acknowledged that the Ombudsman process had no direct equivalent to the issuing of a claim form and that if trustees were forced to issue court proceedings to stop a limitation period running, it would defeat the purpose of having an Ombudsman process. However, the court upheld the appeal, on the grounds that the November 2009 letter from the trustees was not an "unequivocal demand". Instead, the court held that the trustee's first "unilateral" action to assert its claim was its December 2011 response to the Ombudsman complaint, and that this was closest step by analogy to issuing a claim form.

The judge recognised that this conclusion means that, unless a trustee issues court proceedings, a member must bring an Ombudsman complaint before the trustee can stop the six year limitation period running. However, the judge noted that limitation periods should not be a problem for diligent trustees who make a mistake, as they would be able to rely on an unlimited limitation period as long as they could not have discovered the overpayment mistake earlier with reasonable diligence.

This decision introduces further uncertainty for trustees in establishing when a limitation period has stopped running, and is likely to be considered in future Ombudsman determinations on overpayment issues.

Changing from RPI to CPI – consideration by the Court of Appeal

"The issue in the case was whether the trustees had the power to substitute CPI for RPI, following a first instance decision that they did not have this power."

Key points:

> Where the Scheme Rules said pension increases were in line with RPI "*or any replacement adopted by the Trustees*", this only gave the trustees power to select an alternative to RPI when it was replaced.

> Where there is the power to choose the index for pension increases, changing from one index to another does not infringe section 67 as the existing index is not an accrued right.

The Court of Appeal recently heard the *Barnardo's v Buckinghamshire* case, the latest decision on changing from RPI to CPI for pension indexation. The issue in the case was whether the trustees had the power to substitute CPI for RPI, following a first instance decision that they did not have this power. The appeal was brought by the sponsoring employer.

The definition of "Retail Prices Index" in the Rules, said that it was RPI "*or any replacement adopted by the Trustees without prejudicing Approval*". The issue for the Court of Appeal was whether this gave the trustees the power to change the index from RPI at any time, or whether RPI would have to be formally replaced in order for the Trustee to use this power.

At first instance, the judge had held that the trustees only had the power to select an alternative index when RPI had been replaced, and this was upheld by the Court of Appeal.

The Court of Appeal noted that when considering the proper construction of words, the starting point is to give them their ordinary and natural meaning, however there are three points of special relevance in interpreting pension scheme documents:

- Pension schemes are intended to be tax efficient and to comply with Inland Revenue requirements;
- Pension schemes should be interpreted to have reasonable and practical effect; and
- Since the rules of a pension scheme affect all those who join it (in some cases many years after its inception) other background facts have a very limited role to play.

The Court of Appeal held that if the trustees did have the power to simply change the index, this would imply they could equally change to a higher index, which would mean the trustees had the power to impose a greater financial obligation on the sponsoring employer without its consent, which was "*an unlikely conclusion*".

The Court of Appeal did however approve the approach taken in the *QinetiQ* and *Arcadia* cases in relation to accrued rights, in saying that if there had been a choice of index, members would not have had an accrued right to a particular index. Therefore changing from one index to another in those circumstances would not infringe section 67 of the Pensions Act 1995. This is a helpful confirmation of the approach taken in these previous cases.

Transfers to a new pension scheme will be unauthorised if the scheme is void for uncertainty

Key points:

> Where the benefits of a scheme are not sufficiently defined, the scheme will be void for uncertainty.

> If a scheme is void for uncertainty it cannot be a registered pension scheme, and transfers to it will be unauthorised member payments.

“The Tribunal held that the Laversham Scheme was not a registered pension scheme, as it was void for uncertainty.”

Clark v Commissioners for HMRC was an appeal to the First Tier Tribunal Tax Chamber against a decision of HMRC in relation to an unauthorised payments charge. The alleged unauthorised payment concerned a transfer from Mr Clark's self-invested pension plan (“**SIPP**”) to a new scheme, the Laversham Marketing Limited Pension Scheme (the “**Laversham Scheme**”). The Laversham Scheme was set up shortly before the transfer, with a company incorporated in Cyprus as the employer. Mr Clark entered into a contract of employment with the employer, and was the sole scheme member under the Laversham Scheme.

Following the transfer of assets to the Laversham Scheme, Mr Clark signed a deed of waiver involving a surrender of his rights under the Laversham Scheme. This meant the assets in the Laversham Scheme could then be treated as a surplus, and were transferred to the employer. The employer in turn transferred the assets to a company incorporated in the British Virgin Islands, of which Mr Clark was the sole director. This transfer was under an agreement which provided that any assets paid to the employer from the Laversham Scheme would be paid as a dividend to the BVI company. The funds were then lent to Mr Clark in order to make property investments.

The Tribunal held that the Laversham Scheme was not a registered pension scheme, as it was void for uncertainty. This was due to the benefits being defined simply as benefits of the kind prescribed by Part 4 of the Finance Act 2004 and computed in accordance with the limits prescribed by Part 4 of the Finance Act 2004. Following a previous decision in the High Court, the Tribunal held that this meant there was nothing which gave a method of computing the benefits or gave any assistance in working out what the benefits should be. As a result, it was impossible to work out what pension the scheme members could expect to receive under the trust.

As the Laversham Scheme was not a registered scheme, the assets transferred from the SIPP to the Laversham Scheme were held on resulting trust for the SIPP. The transfer was still a payment in respect of Mr Clark however, and was therefore an unauthorised member payment.

Can a pension sharing order be granted over an overseas pension scheme?

> “As a result the judge held that it is not possible to have a pension sharing order for foreign pension arrangements.”

Key points:

> Pension sharing orders cannot be granted over an overseas pension schemes

In *Goyal v Goyal*, a long-running dispute over a divorce, the court considered whether a pension sharing order could be made in respect of an overseas pension scheme. This followed an order by the Court of Appeal that the wife’s pension sharing application should be reheard by the court, after it set aside an impermissible freestanding injunctive order requiring the husband to transfer to the wife his interest in an Indian pension fund.

It was argued that the legislation should be construed to extend pension sharing to a pension which is a qualifying recognised overseas pension scheme (a “**QROPS**”).

The judge referred to the basic rule of statutory interpretation that, unless the contrary is clear, it is assumed legislation does not apply to matters outside of its territory. As a result, even if on a literal interpretation it was possible to interpret the legislation as applying to QROPS, this did not displace the presumption against the extra-territorial effect of the legislation. The judge also referred to the procedure required for pension sharing, including various information requirements, which would only work in the context of a domestic pension.

As a result the judge held that it is not possible to have a pension sharing order for foreign pension arrangements. The judge did, however, note that alternative routes could be used, such as an agreement, backed by undertakings, to obtain an order in the relevant country to split a pension.

This decision clarifies the position in relation to pension sharing for overseas jurisdictions.

Looking ahead

February / March 2017
Judgement expected in BA Case

Trustee duties in relation to awarding discretionary pensions increases.

2017
Judgement expected in Brewster

Rights of a cohabitee to spouse's death benefits.

2017
Judgement expected in Steria case

Relates to requirement for a s.37 certificate.

Appeal date 17 or 18 January 2017
Sterling Insurance Trustees vs Sterling Insurance

Concerns a question of construction.

Appeal date 22 or 23 February 2017
Dutton v FDR Ltd

Concerns a change to the pension increase Rule.

Appeal date 28 February or 1 March 2017
Bradbury v BBC

Concerns a pensionable pay cap.

Granted appeal to be heard May 2017
IBM United Kingdom Holdings Ltd and another v Dalgleish and others

Leave to appeal the "breach" and "remedies" High Court judgments.

4 July 2017
Safeway v Newton

Concerns equalisation.

January / February 2018
Upper Tribunal hearing on Box Clever

The Upper Tribunal will consider the reference in relation to the Determination Panel's determination

Pensions Dispute Resolution Group Contacts

Mark Blyth
Partner
Tel: (+44) 20 7456 4246
mark.blyth@linklaters.com

Madeleine Frost
Managing Associate
Tel: (+44) 20 7456 2423
madeleine.frost@linklaters.com

Geoff Egerton
Managing Associate
Solicitor-Advocate
Tel: (+44) 20 7456 2802
geoff.egerton@linklaters.com

Sarah Opie
Associate
Tel: (+44) 20 7456 3458
sarah.opie@linklaters.com

Simon Borhan
Associate
Tel: (+44) 20 7456 2415
simon.borhan@linklaters.com

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