Welcome

This is the fourth edition of the Linklaters Dispute Resolution Group's Pensions 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 Pension Dispute Resolution Group may be able to assist.

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The information was ascertainable from the Annual Reports and Financial Statements.

When does the limitation period start running in professional negligence claims?

Key points:

> A Trustee will have constructive knowledge sufficient to bring a negligence claim even if it instructs a solicitor, if a reasonably competent solicitor would have acquired the knowledge without using legal expertise.

> Where negligent acts occur within the 15 year longstop for negligence claims, it is not possible to use them as a means to recover losses accrued outside of that 15 year period.

In *Capita ATL Pension Trustees v Sedgwick Financial Services*, the defendants sought summary judgment on a claim by the Trustee that the defendants failed to properly advise it on equalisation amendments to the Rules of the Sea Containers 1983 Pension Scheme. The amendments were made in 1994. This followed discovery that certain amendments were defective, leading to a substantial increase in the liabilities of the pension scheme.

The Limitation Act 1980 provides in relation to negligence that:

- **Section 14A**: where the claimant does not have knowledge of the material facts, the limitation period is the later of (i) six years from when the cause of action accrued; and (ii) three years from the date the claimant had knowledge of the material facts about the damage; knew the damage was attributable to action alleged to constitute negligence; and knew the identity of the defendant.

- **Section 14B**: there is a longstop of 15 years for negligence claims from the date of the defendant's negligent act or omission.

The first issue for the court, was the date on which the Trustee first had the knowledge required to bring a claim against the defendant.

In 2007, a letter had been sent by the Principal Employer’s lawyers to the Trustee’s lawyers, highlighting that equalisation may not have been carried out correctly. This was also notified to the Trustee’s insurers at that time. The Court held that a professional trustee acting reasonably would have read the letter and realised that equalisation could be defective, resulting in additional liabilities for the Scheme.

The Trustee argued that it could not have known the identity of the defendant without expert advice and it had relied on its lawyers to draft a standstill agreement and identify the relevant parties. Proudman J said that a claimant would be fixed with constructive knowledge even if it was reasonable for them to instruct a solicitor, if a reasonably competent solicitor would have acquired knowledge of facts without using legal expertise. In this case it was ascertainable from the Annual Reports and Financial Statements from the relevant time. In addition, the Principal Employer had identified the potential liability of the defendant as a result of its solicitor's investigations.

The second issue addressed by the Court, was when the 15 year time period started running. The Trustee claimed it was in 1999 as that was when the latest negligent act occurred. However, the Court held that all causes of action accruing before 1996 were time barred, as the claim had not been issued until 2011. This followed a previous Court of Appeal decision, which held that it was not possible to rely on a negligent act within the 15 year period to recover losses sustained outside of it.
Can benefits be equalised by being levelled down retrospectively if the amendment power permits retrospective amendments?

Key points:

> Where an amendment power permits amendments to take effect from the date of an earlier announcement, that announcement is not sufficient in itself to equalise benefits.

> Even if an amendment power provides for retrospective amendments, this cannot override the EU law principle that benefits cannot be levelled down retrospectively.

*Safeway v Newton* concerned amendments made to equalise benefits in the Safeway Pension Scheme, in response to the Barber decision on 17 May 1990, where the European Court of Justice held that the principle of equal pay for male and female workers applied to pension benefits, and the subsequent introduction of the “equal treatment rule” by the Pensions Act 1995.

A written announcement issued to members in September 1991 said that the Normal Pension Age in the Scheme would be age 65 with effect from 1 December 1991. TheScheme Rules were not amended by deed until 2 May 1996.

The amendment power in the Scheme Rules provided that amendments must be made by deed, but the deed could have retrospective effect to the date of any prior written announcement to members or a reasonable time before the amendment. The Scheme had been administered on the basis that equalisation was effective from 1 December 1991, the date of the announcement. The claimant argued that the 1991 notices were effective to reduce accrued rights after 1991, therefore the 1996 deed did not reduce any rights accrued from that date.

Warren J held that the announcement did not bring about a change in Normal Pension Age, it was only in conjunction with the actual exercise of the amendment power in 1996 that the change could take effect. The exercise of the amendment power was not complete until a deed had been executed, therefore the Trustee or Principal Employer could have changed its mind between the announcement and formally amending the rules.

Warren J held that the amendment power could not be used to retrospectively level down benefits. Although the amendment power permitted retrospective amendments, this could not be used to circumvent established principles of EU law.

The 1991 announcement was not effective to equalise benefits, therefore equalisation was not effective until the execution of the deed in 1996.
Can a contractual entitlement to defined benefit pension arrangements be implied into an employment contract?

Key points:

> The Court will generally expect pensions promises to be documented in writing

> The Court will not imply a requirement to provide defined benefit pension arrangements into a contract of employment

Prometric v Cunliffe concerned an employee, Mr Cunliffe, who claimed he should continue to be given access to a defined benefit pension arrangement following a sale of his employer. Mr Cunliffe had joined the Thomson Pension Scheme, a defined benefit scheme operated by the Thomson Corporation group, in 2001. Mr Cunliffe's contract of employment said that he was not entitled to membership of an occupational pension scheme. However, he alleged that there had been a verbal agreement that he should be provided with a defined benefit pension entitlement.

In 2007, Mr Cunliffe's employer, Prometric, was sold by Thomson Corporation. Mr Cunliffe ceased to be a member of the Thomson Pension Scheme on this date, although he was not consulted or informed about the change. Mr Cunliffe was provided with benefits under a defined contribution arrangement from 2007.

Mr Cunliffe claimed that Prometric had made a binding undertaking that he would be a member of the defined benefit scheme, which had been breached since 2007. Prometric sought to strike out the claim, which was dismissed at first instance.

The Court of Appeal held that Mr Cunliffe's claim could not succeed and granted the strike out claim. This was on the basis that “on subjects as complex as pensions, businessmen do not enter into oral agreements; and if they do, they certainly confirm them in writing”. The Court did not consider Mr Cunliffe's membership of the Thomson Pension Scheme between 2001 and 2007 to be evidence that it was anything other than discretionary, or as evidence of an obligation to provide defined benefits after the sale.

In addition, the Court of Appeal did not consider it possible to imply a term into Mr Cunliffe's contract of employment requiring his employer to provide an alternative defined benefit arrangement.
Can an actuary take account of security of benefits in giving their certificate for a bulk transfer without consent?

Key points:

> Security of benefits cannot be taken into account by an actuary in certifying a bulk transfer without consent, whether in an ongoing scheme or a scheme in wind-up

> The Trustees were entitled to decide it was in members’ best interests to enter into a transaction where the receiving scheme would provide lower benefits than the transferring scheme, but greater benefit security, where the transferring scheme was expected to go into the PPF

In *Pollock v Reed*, the Trustees of the Halcrow Pension Scheme (HPS) sought the Court's approval for a bulk transfer without consent to a new occupational pension scheme (HPS2). The reason for seeking the Court's consent was that HPS2 would provide lower benefits than HPS. The sponsoring employer was balance sheet insolvent and its parent company had indicated it would no longer support the company. Without the transfer, the expectation was that the sponsoring employer would be placed into administration and HPS would go into the PPF. Although HPS2 would provide lower benefits than HPS, the benefits would be at least equal to PPF compensation and in many cases would be greater.

The Trustees took advice and were satisfied the transaction was in the best interests of the members. They agreed to proceed subject to Court approval. The Preservation Regulations required the scheme actuary to certify that the transfer credits to be acquired for each member under HPS2 were broadly no less favourable than the rights to be transferred. One of the issues before the Court was whether the scheme actuary could take into account the greater security in HPS2 when determining whether the transfer credits obtained were “broadly no less favourable”.

The Trustees argued that the actuary should take into consideration security of benefits in the transferring and receiving schemes and the likelihood of the benefits being paid. The Pensions Regulator and representative beneficiary argued that the headline benefits should be compared, and that security of benefits was not relevant.

The Court held that it was not possible for the certificate required by the Preservation Regulations to be given in the circumstances. The actuary could not take into account security of benefits as a factor when giving his certificate. If it had been intended that security should be taken into account, the regulations would have said so. The comparison should be made between the headline benefits and not the question of how likely it was that those benefits would be paid.

The Trustees argued that even if security of benefits could not be taken into account where the transferring scheme was ongoing, it was relevant where the scheme was in winding up. The Court rejected this argument, and held that there was no scope for a different analysis of the certification requirements if a scheme was winding-up.

The Court also considered the decision making process of the Trustees. The Court held that the Trustees undertook a careful and proper review of the relevant issues and took full and proper professional advice on those issues. If the conclusion on the legal issues had been different, the Judge would have approved the Trustees’ decision to enter the transaction.
Does a member have to be employed with a participating employer in the receiving scheme in order to have a statutory right to transfer their pension benefits?

Key points:
> A transferring member does not have to be employed by a participating employer in the receiving scheme in order to have a statutory right to transfer their benefits

> In order to be classified as an “earner” for the purposes of legislation, it is only necessary that an individual receives earnings, whether or not they are from employment with a participating employer in the receiving scheme.

Donna-Marie Hughes v The Royal London Mutual Insurance Society Limited, was heard on appeal from a decision of the Pensions Ombudsman concerning the transfer of Ms Hughes’ accrued rights under the Royal London Personal Pension Scheme (the “Transferring Scheme”) to the Babbacombe Road 1973 Limited SSAS (the “Receiving Scheme”), an occupational small self administered scheme of which she was a member.

Royal London Mutual Insurance Society Ltd (“Royal London”), the administrators of the Transferring Scheme declined Ms Hughes’ request for a transfer and expressed concerns about the possibility of pensions liberation. Royal London considered that Ms Hughes did not have a statutory right to transfer her accrued rights, Royal London said that it was exercising its “absolute discretion” (as it was phrased in the rules) to refuse the transfer because of its pension liberation concerns.

The Ombudsman disagreed with Royal London’s analysis in this respect and determined that the Receiving Scheme was an occupational pension scheme. However, the Ombudsman considered that Ms Hughes may not have had a statutory right on other grounds.

Under legislation, Ms Hughes’ transfer right relied on her acquiring “transfer credits” in the Receiving Scheme. “Transfer credits” are defined in legislation as “rights allowed to an earner...”. “Earner” for this purpose is defined as follows:

“(a) “earnings” includes any remuneration or profit derived from an employment; and (b) “earner” shall be construed accordingly.”

In the Ombudsman's view, this meant that Ms Hughes was only an “earner” if she received earnings from an employer of the Receiving Scheme.
The Ombudsman held that, as Ms Hughes was not an “earner” for the purposes of the legislation, she did not have a statutory right to transfer her pension and that Royal London did not act improperly in deciding to exercise its discretionary power to refuse the transfer.

Ms Hughes appealed the Ombudsman’s determination to the High Court on two grounds. First, she argued that she was an “earner” under legislation as that definition did not require her to receive earnings from an employer of the Receiving Scheme, but rather simply to be in receipt of earnings from any source. Secondly, she argued that even if she did not have a statutory right to the transfer, Royal London acted improperly in exercising its discretion to refuse the transfer.

The High Court allowed Ms Hughes’ appeal and held that she did have a statutory right to transfer. The High Court considered that the Ombudsman’s interpretation of the legislation required words to be read into the relevant statutory provisions, without which there could be no basis on which the definition of “earner” required receipt of earnings from an employer of the Receiving Scheme.

Referring to the decision of the House of Lords in Inco Europe Ltd v First Choice Distribution, the High Court did not think that it was open to the Court to read words into the definition in this way. In order to do so, the High Court would need to be “abundantly sure” of three matters:

“(1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed.”

Applying that test, the High Court felt unable to read in the words necessary to reach the Ombudsman’s determination. As Ms Hughes received earnings from sources other than the Receiving Scheme’s employers, she was an “earner” under the legislation and was therefore entitled to require Royal London to process her transfer.

As Ms Hughes’ appeal was successful on her first ground the High Court did not need to reach a conclusion on whether Royal London had acted improperly in exercising its discretion to refuse the transfer.
What rate of interest will a Court apply to an outstanding debt?

Key points:
> The “judgment rate” of 8% was so far in excess of the rate generally awarded that it was inappropriate.

> The default position in commercial cases is to award 1% above the prevailing base rate, but the Court will take into account historic interest rates when exercising its discretion.

In *Oyesanya v Mid-Yorkshire Hospital NHS Trust*, Oyesanya appealed a decision of the High Court that a large part of his claim for remuneration owed by the Mid-Yorkshire Hospital NHS Trust for services rendered in 2000 had been statute-barred. Oyesanya issued a claim for the unpaid salary on 30 November 2006 and claimed interest on the principal sum outstanding at the rate of 8% under the Judgments Act 1838, known as the “judgment rate”.

The issue of the rate of interest to be applied to his claim was not considered before the High Court. However, on appeal to the Court of Appeal, two issues on the claimed interest had to be dealt with: (i) over what period should interest run; and (ii) at what rate should interest be applied.

On the question of period, there had been quite a significant delay between the accrual of the cause of action (30 November 2000) and the date of trial (July 2010). The Court of Appeal held that this delay was caused at least in part by Oyesanya. As a result, the Court of Appeal held not to award interest for the entire period but only for a period of 8 years (roughly half of the period from the accrual of the cause of action to the Court of Appeal's decision).

In relation to the rate of interest to be applied, Counsel for Oyesanya noted that claiming 8% interest was optimistic but not unrealistic. While the Court of Appeal saw the convenience of adopting the judgment rate which it noted was well known and had not changed for many years, it was, in the Court's view, so much in excess of the rate generally awarded that it was inappropriate.

The Court said that the default position in commercial cases is to award 1% above the prevailing base rate, unless to do so would be unfair on either of the parties. In the event, the Court awarded interest at the rate of 5%. The Court of Appeal stressed that this was to reflect the period from 2001, when the delay was less pronounced, that the prevailing base rate was much higher.
Rectifying mistakes in a deed of amendment by summary judgment

Key points:
> There must be compelling evidence demonstrating that there was a mistake and that the rectification sought will give effect to the intentions of the parties. This is a high threshold.

> A rectification order may be made by summary judgment, particularly where each of the parties had investigated, weighed and correctly rejected every potential defence to a rectification.

Hogg Robinson plc ("Hogg") was the principal employer of the Hogg Robinson (1987) Pension Scheme (the "Scheme"), a defined benefit occupational pension scheme.

In Hogg Robinson Plc v Brian Harvey and others, Hogg sought summary judgment in respect of a deed of amendment dated 8 September 1999 (the "Amendment Deed") which sought to amend the rules of the Scheme to reduce the rate at which annual increases were made to benefits in payment and in deferment. In error, the Amendment Deed did not change the rate of revaluation of deferred benefits and instead applied only to increases to pensions in payment. Hogg sought to rectify the Amendment Deed.

Prior to the Amendment Deed, the Scheme rules provided for benefits in deferment and benefits in payment to be increased by an annual compounded figure of 5%. The Scheme’s amendment power was relatively broad and permitted the Company, with the consent to the trustees, to amend, modify or add to the provisions of the rules, subject to a restriction that no such amendment, modification or addition should prejudicially affect any pensions already being paid or any benefits already accrued as at the date of the amendment.

The defendants, a representative beneficiary and the trustees, were neutral to the rectification claim.

The Court, following the case of IBM United Kingdom Pensions Trust Ltd v IBM United Kingdom Holdings Ltd, set out the requirements for a claim of rectification:

"... there needs to be cogent evidence of the intentions of the trustees and of the employer where the power of amendment of a trust deed requires the consent of both. The collective intention of the employer and the trustees need to be established objectively, at the time of execution of the deed of amendment by each, but there is no need to establish a prior consensus between them as to what the deed should provide…"

It was held that there was no need for a trial as the Court was satisfied that the legal advisers for each of the parties (including the representative beneficiary) had investigated, weighed and correctly rejected every potential defence to the rectification. The Court thought that it was in all of the parties’ interests that there should not be a full trial.

Having considered the extensive evidence before it, the Court granted rectification by summary judgment. In doing so, the Court was of the view that there was no doubt that, objectively assessed, the Company and the Trustees intended to amend the rules of the Scheme to reduce the rate of increase of benefits both in payment and in deferment.
This evidence “compellingly established that a mistake was made in drafting”.

In reaching this conclusion, the Court considered the evidence for the rectification which related to the period before and immediately after the execution of the Amending Deed. Together, this evidence “compellingly established that a mistake was made in drafting” the Amending Deed. The evidential burden is high, but was satisfied in this case. The evidence included:

- Calculations made by the Scheme actuary and a draft valuation of the Scheme which showed that the benefit structure would be changed such that increases (both in payment and in deferment) would be reduced.

- Minutes of a meeting which recorded that Hogg had proposed changes to the increase provisions and the Court thought it was clear that this decision applied to both benefits in payment and in deferment in accordance with the recommendation and presentation made to it.

- An announcement to Scheme members which explicitly stated that the lower increases would apply both to benefits in payment and in deferment.

- Witness evidence of the joint intention of the Company and the trustees.
## Looking ahead

<table>
<thead>
<tr>
<th>Date</th>
<th>Case / Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>April 2016</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Appeal in Horton v Henry to be heard in the Court of Appeal</strong></td>
</tr>
<tr>
<td></td>
<td>What sort of pension benefits can be called upon in bankruptcy proceedings.</td>
</tr>
<tr>
<td></td>
<td>Reserved judgement given 21 April 2016</td>
</tr>
<tr>
<td><strong>17 or 18 May 2016</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Appeal in Heis and others v MF Global UK Services Ltd</strong></td>
</tr>
<tr>
<td></td>
<td>See first edition of our Case Alert. Judgement pending</td>
</tr>
<tr>
<td><strong>11 or 12 July 2016</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Appeal in Gleeds</strong></td>
</tr>
<tr>
<td></td>
<td>The consequences of not following execution formalities; breaking the final salary link</td>
</tr>
<tr>
<td><strong>October 2016</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>BA Case</strong></td>
</tr>
<tr>
<td></td>
<td>Trustee duties in relation to awarding discretionary pensions increases</td>
</tr>
<tr>
<td><strong>December 2016</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Appeal to Court of Appeal</strong></td>
</tr>
<tr>
<td></td>
<td>Granada case</td>
</tr>
<tr>
<td></td>
<td>Permission to appeal granted. Date TBC</td>
</tr>
<tr>
<td></td>
<td><strong>Brewster</strong></td>
</tr>
<tr>
<td></td>
<td>Rights of a cohabitee to spouse’s death benefits</td>
</tr>
<tr>
<td><strong>Trial Date TBC</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Upper Tribunal hearing on Box Clever</strong></td>
</tr>
<tr>
<td></td>
<td>The Upper Tribunal will take its decision again in light of the Court of Appeal decision</td>
</tr>
<tr>
<td><strong>Appeal date 17 or 18 January 2017</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Sterling Insurance Trustees vs Sterling Insurance</strong></td>
</tr>
<tr>
<td></td>
<td>Concerns a question of construction.</td>
</tr>
<tr>
<td><strong>Appeal date 22 or 23 February 2017</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Dutton v FDR Ltd</strong></td>
</tr>
<tr>
<td></td>
<td>Concerns a change to the pension increase Rule.</td>
</tr>
<tr>
<td><strong>Granted appeal to be heard May 2017</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>IBM United Kingdom Holdings Ltd and another v Dalgleish and others</strong></td>
</tr>
<tr>
<td></td>
<td>Leave to appeal the “breach” and “remedies” High Court judgments.</td>
</tr>
</tbody>
</table>
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