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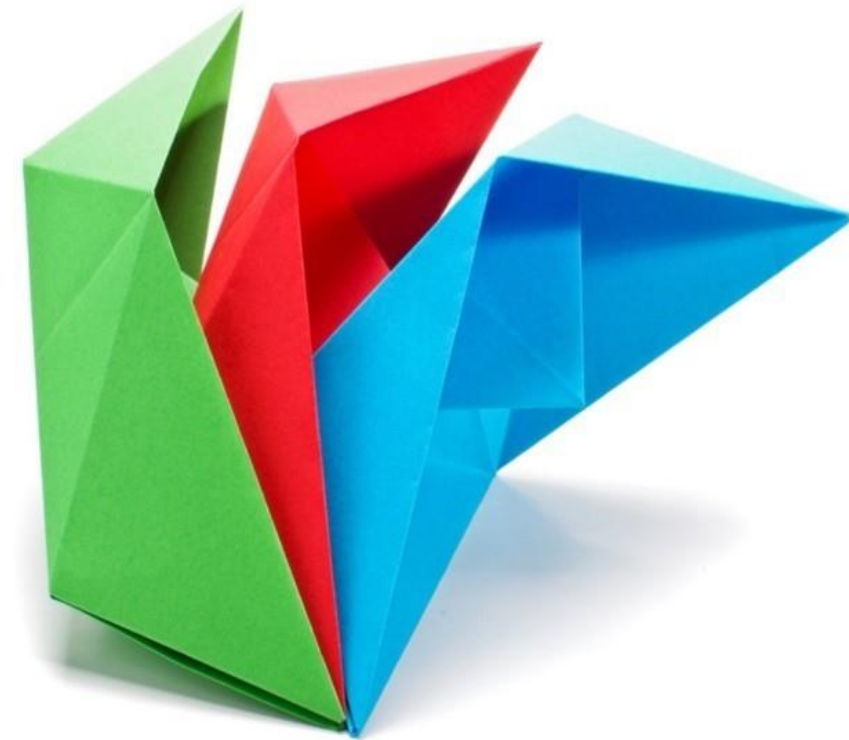
Recent Judgments: the Practical Impact on Pension Schemes

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Agenda

Themes of cases over the last 12 months:

Transfers

Regulator /
PPF cases

Indexation

Equalisation

Transfers

TPO directs reinstatement of benefits in connection with a dispute over a transfer

PO-20365

- A member complained about missing benefits – the scheme said she had transferred out in 1989 (and had copies of contemporaneous letters to the receiving administrator stating that a cheque for the full transfer value was attached, and a letter to the member confirming the payment).
- However, neither the receiving scheme nor HMRC had any record of the receiving scheme being liable for the member's benefits.
- TPO concluded that, on the balance of probabilities, the member had not transferred out, and the transferring trustee was directed to reinstate her benefits.

Transfers

TPO directs reinstatement of benefits in connection with a dispute over a transfer

PO-22965

- TPO directed a SIPP provider to pay the amount of a transferred sum (plus interest) into the member's SIPP, following a complaint about inadequate due diligence checks in 2017.
- TPO concluded that the provider had not carried out sufficient due diligence, including by not contacting the member.
- Although a full check would have been unlikely to categorically identify the receiving scheme as a scam, the provider was responsible for putting the member in a position where he could make an informed decision.

Transfers

Transfer delays: investment loss (**Tenconi v James Hay**)

- There is new guidance from the High Court on determining if a member has suffered investment losses due to a delayed transfer. The member had complained about losing the opportunity to invest at the time of the Brexit referendum.
- TPO had concluded that the losses claimed were both too uncertain and not reasonably foreseeable. The High Court ruled that TPO had applied the wrong test, and had set too high a bar. The matter was remitted to TPO to be decided, with the following guidance:
 1. Identify the date on which the funds should have arrived, if there had been no maladministration.
 2. Determine what the member would have done if the funds had arrived by that date (the member bears the burden of establishing this).
- The PO determination has just been published. In it the PO chooses the date on which he thinks the investment would have been made, and what that investment would have been.

Transfers

Pension scams / liberation

PO-12324

- The member transferred out in March 2013. He complained that the scheme had not carried out sufficient due diligence, and had failed to adequately inform him about pension liberation.
- The scheme had not updated its procedures following the guidance until May 2013 – TPO considered this delay was not unreasonable.
- Although the scheme did not provide the Scorpion leaflet, it had given sufficient information (and warnings) about pension liberation in its own leaflet.
- The member raised the Police Pension Scheme decision, but TPO said that the warning the member had been given meant he was in a different position.

Indexation

Britvic plc v Britvic Pensions Ltd

- The High Court has rejected a claim by an employer that it had the power to reduce increases for pensions in payment below the default rate in the rules, and to set a different rate for the revaluation of deferred pensions.
- The case centred on whether, under the scheme rules, the employer could unilaterally reduce the rate of increases for pensions in payment, and whether deferred pensions could be revalued at a different rate.
- The judge concluded, as a matter of interpretation, that the employer had the power to award increases above the default rate in the rules (but did not have the power to reduce increases below this rate), and that the revaluation rule was the same as the increases rule for this purpose.

Equalisation

Safeway v Newton (Section 62 issue)

- The Court of Appeal has handed down a further decision in the *Safeway v Newton* equalisation dispute.
- Following the CJEU's decision in the case last year, Safeway no longer argued that the amendment to the Scheme validly equalised the NPAs at 65 from the date of the announcement in 1991. The latest decision therefore deals only with the section 62 issue (which the Court of Appeal had deferred until after the CJEU decision).
- Safeway argued that, when the equal treatment rule in section 62 of the Pensions Act 1995 came into force on 1 January 1996, it closed the *Barber* window by levelling up benefits – it was argued that the domestic law effect of the May 1996 Deed had been nullified by European law between December 1991 and 31 December 1995, but that the Deed was effective to 'level down' the NPAs of men and women (at age 65) with effect from 1 January 1996.
- The Court of Appeal unanimously ruled that section 62 closed the *Barber* window with effect from 1 January 1996.

Regulator / PPF cases

Norton Motorcycles

- **Facts:** Various scheme members complained that the sole trustee of three pension schemes had acted in conflict of interest, breached investment duties and committed breaches of trust, and that members' benefits had been lost. The schemes were established by deeds executed by Mr Garner in his capacity as the sole trustee of the schemes and sole director of Manocrest Ltd.
- Scheme funds had been invested in their entirety in preference shares in Norton Motorcycles Holdings Ltd ("Holdings") in circumstances where Mr Garner was a major shareholder in Holdings, the sole director of Holdings and two of its subsidiaries (and a director of a third subsidiary), and the CEO of those companies. Mr Garner did not take any written investment advice on the investment of the scheme funds.
- **Decision:** TPO upheld the complaints and made various findings, including that Mr Garner had acted dishonestly and in breach of his duty of no conflict, his duty not to profit and his duty to act with prudence; the investments were made in breach of Mr Garner's statutory investment and trust law duties; Mr Garner was in breach of his statutory duty to have adequate internal controls and TKU; and there had been related maladministration.
- TPO concluded that he was not excused from liability in reliance on exoneration clauses, an indemnity in application forms completed by members, or section 61 of the Trustee Act 1925. Mr Garner was ordered to pay a 'restorative amount' to the scheme, plus interest, as well as £6,000 compensation to each applicant for distress and inconvenience. He is understood to have filed an appeal.

Regulator / PPF cases

Hughes v Board of the PPF

- The High Court has ruled that the PPF compensation cap is discriminatory on the grounds of age contrary to EU law, and that the relevant provisions in the Pensions Act 2004 must be disapplied. Mr Justice Lewis also ruled on the following points:
 - ✓ The Insolvency Directive does not require the PPF to assess whether the compensation payable in each pension year is equivalent to 50% of the pension benefits that would have been payable under the relevant scheme in that year – the PPF is entitled to adopt a scheme that ensures that the overall compensation payable during retirement (or the lifetime of a survivor) will equal 50%. The mechanism for achieving this is a matter for the PPF.
 - ✓ Claims against the PPF for arrears of compensation (due to the application of the compensation cap) are subject to a six-year statutory limitation period.
 - ✓ During the PPF assessment period, pension scheme trustees must ensure that benefits paid under the pension scheme do not exceed the compensation that would be payable by the PPF (plus any sums the PPF must pay by reason of the Insolvency Directive).

Questions?

