

LLOYDS and BIC

UNDERPAYMENTS and OVERPAYMENTS

Keith Rowley Q.C.

***Lloyds Banking Group Pensions Trustees Ltd.
v. Lloyds Bank Plc [2019] Pens LR 5***

***Burgess v. BIC UK Ltd. [2018] Pens LR 13
(Arnold J), [2019] EWCA Civ 806 (CA)***

Underpayments in sex equality cases

Equality Act 2010 s. 134 (*“Remedies in claims for arrears brought by pensioner members”*)

“(1) This section applies to proceedings before a court or employment tribunal on a complaint by a pensioner member of an occupational pension scheme relating to a breach of an equality clause or rule with respect to a term on which the member is treated.”

“(2) If the court or tribunal finds that there has been a breach referred to in subsection (1), it may—

...

(b) order an award by way of arrears of benefits ... in relation to the complainant.

(3) The court ... must not order an award under subsection (2)(b) in respect of a time before the arrears day.”

“arrears day” means “[t]he day falling 6 years before the day on which the proceedings were commenced”

Members' initial argument

- CPR Part 8 proceedings, not claims for arrears (!)
- *Thomson v. Bruty* [1920] 1 Ch 508: trustee reliance on limitation inconsistent with duties owed to beneficiaries
- Judge (§451): *"if statute expressly gives to a trustee a limitation defence to a claim by a beneficiary, it is a little strange to think that the trustee is acting in breach of trust by relying on the statutory defence"*

Members' new argument: s. 134 should be disapplied as breaching EU law principle of equivalence

"requires a claim to a remedy for breach of a right conferred by European law to be treated in no less favourable a way than a similar domestic claim would be treated" (§424)

What was the similar domestic claim?

- Claim by an underpaid beneficiary under a conventional trust
- Governed by LA 80 s. 21 (originally TA 1888 s. 8)
- Pre-1888 no limitation period applicable to any claims against trustees

"(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust ...

...

(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."

- Wealth of authority on other aspects of LA80 s. 21 (company directors, accessories, etc.)
- None on this basic point
- Published texts silent, *e.g.*, Lewin, Snell and Underhill & Hayton (trusts) and McGee (limitation)

- What is an action *"to recover trust property from a trustee"*?
- *"I consider that, in a case where the trustee has retained the assets which are subject to the trust and out of which the trustee is obliged to make the payment to the beneficiary, prima facie section 21(1)(b) does apply to a claim of the kind envisaged and so there is no limitation period under the 1980 Act in relation to such a claim."* (§434)

- Is the expression really apt to refer to a claim by an underpaid beneficiary?
- Suppose the scheme is substantially in deficit. Does judge's reasoning still apply?
- Consistent with policy underlying s. 21?
- Result: judge disapplied s. 134

Forfeiture

PA 95 s. 92(1)

"Subject to the provisions of this section and section 93, an entitlement to a pension under an occupational pension scheme or a right to a future pension under such a scheme cannot be forfeited."

Exceptions

- Sect. 92(4) (conviction for treason or under Official Secrets Act and sentenced to at least 10 years in prison)
- Sect. 92(5) more pertinent:

"Subsection (1) does not prevent forfeiture by reference to a failure by any person to make a claim for pension—

(a) where the forfeiture is in reliance on any enactment relating to the limitation of actions, or

(b) where the claim is not made within six years of the date on which the pension becomes due."

- Does sub-paragraph (a) shed light on Parliament's understanding of LA 80 s. 21(1)(b)?
- What is meant by a "*claim*" in this context?
- Not contended it required commencement of proceedings

Judge rejected argument did not apply to a miscalculation

"Section 92(5) refers to "a claim for pension" but "pension" is defined by section 94(2) to include any part of a pension or any payment by way of pension. Thus, where a beneficiary's payments are wrongly calculated and he is underpaid, and the beneficiary does not make a claim in relation to the underpayments, that would be a case where the beneficiary had not made a claim for a payment by way of pension within section 92(5) and a rule which provided for forfeiture after six-years would be a valid rule for the purposes of section 92." (§417)

Was the Judge right?

- Section of general application
- Sect. 94(2) - "*any part of a pension*" is important
- Limitation generally does not depend on knowledge
- Parliament did not include a requirement for knowledge

"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."

(Rule 1: judgment §§402, 408 & 416-417)

"the Trustee may also reduce a person's benefits, or decide that a person's benefits will be forfeited, in any other circumstances allowed by sections 91 and 92 of the Pensions Act 1995"

(Rule 5, judgment §§406, 412 & 418)

Possible exercise of discretion in defective amendment cases

- What if there is a negligence claim against the advisers?
- Occupational Pension Schemes (Modification of Schemes) Regulations 2006 S.I. 759 reg 3(b)

Overpayments

- Mr Webber, DfE and the TPS
- Retired early in 1997 at age 50
- Returned to teaching in 2001, continued until 2008-2009 and fell foul of TPS rule
- Overpayments of c.£36,000 appreciated by Scheme administrator in early 2009 for them
- Told he would be "*pursued robustly*"

- Complaint to Ombudsman "*in relation to the recovery of an overpayment of his pension under the Teachers' Pension Scheme*"
- Issues as to information provided to Mr Webber, should Scheme administrator have appreciated he had exceeded prescribed level and possible change of position defence
- 3 Ombudsman determinations and 3 High Court judgments

- 84498/1(26 June 2012, DPO)
- [2012] EWHC4225(Ch) (Asplin J, unreported)
- PO-2080 (24 January 2014, DPO)
- [2015] ICR 544 (Nugee J)
- PO-8094 (2 February 2016, Anthony Arter)
- [2017] ICR 198 (Edward Bartley Jones QC)

"In a claim for restitution on the grounds of a payment that has been made by mistake, a Claimant, in consequence of section 32(1) of the Limitation Act 1980, would have six years from the date on which the Claimant could with reasonable diligence have discovered the mistake in payment within which to issue court proceedings for recovery." (DPO)

See now *Aspect Contracts (Asbestos) Ltd. v. Higgins Construction Plc* [2015] 1 WLR 2961.

No court proceedings so when did time stop running against DfE?

- Nugee J: when Mr Webber made his complaint to the Ombudsman
- Ombudsman: when repayment formally demanded (c. 2 years earlier)
- Deputy Judge: when administrator responded to Mr Webber's complaint (c. 6 months later)

- Illustrates the difficulty of applying LA 80 to Ombudsman process
- But risk of losing sight of true issue
- Complaint was in respect of a trustee claim to recover, by compelling repayment, of mistaken overpayments made to a beneficiary

- Ombudsman subsequently seemed to lose sight of the point - *D v. BIC UK Pension Scheme* (PO-1918)
- Trustees argued LA 80 s. 5 (“*action founded on simple contract*”) did not apply to equitable recoupment
- “*Webber dealt with relevant limitation periods and the cut-off date for overpayment complaints before the Ombudsman*”
- “*the balance of authority is that restitutionary claims for unjust enrichment (such as overpayment cases) are generally statute barred after six years under [LA 80 s. 5] section 5*”

BIC

- Purported grant in 1991 of increases to pensions in payment but without principal employer and trustees complying with prescribed PoA formalities
- Failure would work in employers' favour and result in members receiving less than that which everyone thought was their entitlement

- If amendment invalid, pensioners had received increases between 1992 and 2011 (suspended when issue came to light) to which they were not entitled
- Same scheme trustees as in *D v. BIC* relied on *Webber* and Ombudsman in contending LA 80 s. 5 did apply applied to equitable recoupment

"... BIC UK submitted that ... equitable recoupment was not a restitutionary claim for unjust enrichment, it was an equitable self-help remedy which did not involve any claim for payment back of the monies paid in the past but an adjustment of accounts in the future ... In support of these submissions, counsel relied upon the statement in Lewin at §42-010 that "the right of recoupment, being a matter of adjustment of accounts by the trustee, is not subject to the Limitation Act 1980", citing Re Robinson [1911] Ch 502."

"I accept these submissions."

But not universally acclaimed

- *Financial Times* 26 April 2018, said "contradicts a previous High Court ruling from 2016, in the case of Webber"
- Practitioner quoted in FT as saying

"we are now in a very unsatisfactory situation, where we don't have a clear ruling by the High Court as to what is the right answer."

Two responses:

- If two inconsistent decisions, then subsequent judges should follow later decision and leave choice to CA
- But they are not inconsistent, because they deal with different remedies

(Note: Law Commission suggested (in 2001) application of LA 80 section 5 to restitutionary claims should be reconsidered, but not so far actioned)

- Ombudsman 2017-2018 Annual Report
- *"the judgment does not really deal with the practical side of how these types of complaints are presented to us"*
- Also unhappy at not being held by Arnold J to be a *"competent court"*

PA 95 s. 91(6)

“Where a charge, lien or set-off is exercisable ...

...

and where there is a dispute as to its amount, the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court or in consequence of an award of an arbitrator or, in Scotland, an arbiter to be appointed (failing agreement between the parties) by the sheriff.”

Ombudsman disagrees:

- 2017-2018 Annual Report
- 2018 APL Prestige Lecture
- *"Recoupment in overpayment cases: the Pensions Ombudsman is a 'competent court'"* (April 2019)
- Would be a convenient result but very difficult to get from the language of PA 95

BIC in CA

- *Professional Pensions: "BIC scheme to recoup £5m from members after pre97 increases annulled"*
- Did not consider any of these points (and not referred to in argument)

But do note

- *Davis v. Richards & Wallington Industries Ltd.* [1990] 1 WLR 1511 has its limits and is not a universal panacea.
- Obiter comments on phrase "*resolution (in writing)*" in PoA, and inclined to think later approved minutes of an earlier oral resolution would not suffice.