Judicial review in pensions cases—appropriate forum for pensions complaints (R (on the application of Grace Bay II Holdings SARL and others) v The Pensions Regulator)

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Pensions analysis: In a recent decision, the Administrative Court confirmed that where there is an alternative remedy available to claimants the court will only grant judicial review in exceptional circumstances. Tom Robinson, barrister at Wilberforce Chambers London, who was part of The Pensions Regulator's counsel team in the case, and in the underlying regulatory proceedings, discusses the issues raised in the case.

Original news

R (on the application of Grace Bay II Holdings SARL and others) v The Pensions Regulator [2017] EWHC 7 (Admin), [2017] All ER (D) 29 (Jan)

The Administrative Court, in dismissing the claimants' application for judicial review, held that the claimants had an alternative remedy available to them and that there was nothing exceptional about their challenge which warranted judicial review. Accordingly, the Administrative Court was not the appropriate forum to resolve the claimants' challenges to a second warning notice issued by the respondent Pensions Regulator.

What was the background to the case?

On 7 May 2011 the business and assets of the Silentnight group of companies were acquired by members of a US private equity group, HIG, after those companies had entered administration. The Silentnight group included the sponsoring employers of the Silentnight Defined Benefit Pension Scheme (the Scheme). The Scheme was in significant deficit. The effect of the sale was to separate the Scheme from the business of its employers and leave it likely to enter the Pension Protection Fund (PPF).

The Pensions Regulator investigated the transaction and in December 2014 commenced regulatory action against individuals and companies associated with the HIG group. It issued a 'warning notice' to those persons, under section 96 of the Pensions Act 2004 (PeA 2004), setting out a case that 'contribution notices' should be issued to them under PeA 2004, s 38, in the sum of £17.16m (WN1). WN1 relied on expert evidence that the business and assets of the Silentnight group had been sold at an undervalue.

The trustees of the Scheme made representations in response to WN1. They provided evidence that suggested the Silentnight group could have refinanced, meaning its administrations and the sale of its business and assets could have been avoided. This would have left the Scheme still supported by its sponsoring employers.

The Pensions Regulator investigated this and issued a second warning notice in June 2016 (WN2). WN2 was issued to the same individuals and companies, also seeking the issue of 'contribution notices' to them under PeA 2004, s 38 but in a higher sum as an alternative to the relief sought in WN1. WN2 relied on expert evidence that the Silentnight group could have been refinanced.

What arguments did the claimants put forward in support of their application for judicial review of The Pensions Regulator's decision to issue a second warning notice?

The claimants relied on two alternative grounds:

- the first was that The Pensions Regulator had no power to issue two warning notices seeking the use of the same regulatory function against the same persons arising out of the same facts
- the second ground was that, even if The Pensions Regulator had such a power, it had exercised it unlawfully on the facts of this case

The first ground was an issue of the proper construction of PeA 2004, in particular s 96(2). This requires The Pensions Regulator, when seeking to exercise its regulatory functions, to follow a procedure which requires it to give notice to all those directly affected by the regulatory action under consideration. The procedure then provides for those 'directly affected' persons to have the opportunity to make representations, for a determination to be made whether to take the regulatory action under consideration, and for that determination to be referred to the Upper Tribunal for a rehearing.

The requirement to give notice is found in PeA 2004, s 96(2)(a), which states that the procedure must provide for 'the giving of notice to such persons as it appears to the Regulator would be directly affected by the regulatory action under consideration (a "warning notice")'. The claimants put weight on the fact that 'a warning notice' was drafted in the singular. They argued that two concurrent warning notices did not comply with Parliament's intention that The Pensions Regulator should set out the case to be met in 'a warning notice'.

What were the legal principles involved? What was the Administrative Court's approach?

The Pensions Regulator and trustees argued that the application should be dismissed. They contended that both grounds relied on by the claimants were wrong.

They also contended that there was an 'alternative remedy' for the matters raised by the claimants, which meant that the claimants should be refused permission for judicial review. This is a well-established principle in judicial review. It has recently been discussed and applied in cases concerning the regulation of the financial services industry, and the judge relied on three of these: *R (on the application of Davies) v Financial Services Authority* [2003] EWCA Civ 1128, [2003] 4 All ER 1196, *R (on the application of Griggs) v Financial Services Authority* [2008] EWHC 2587 (Admin), and *R (on the application of Willford) v Financial Services Authority* [2013] EWCA Civ 677, [2013] All ER (D) 114 (Jun).

The essential principle in these cases was stated by the Court of Appeal in *Willford* at para [20]:

> '…where there is an alternative remedy available to the claimant the court will not ordinarily allow him to proceed by way of judicial review, save in exceptional circumstances, usually because it is satisfied that the alternative remedy is for some reason clearly unsatisfactory'.

The alternative remedy in those cases was the claimant's ability to raise its complaints within the statutory scheme for financial services regulation. This included the right to a rehearing before the Upper Tribunal in the event the claimant was unsuccessful before the regulator's Regulatory Decisions Committee. The principle was applied in *Davies* to an application for judicial review that argued warning notices issued by the Financial Services Authority were ultra vires and an abuse of process.

What did the Administrative Court decide and why?

The judge (Whipple J) decided that an alternative remedy was available for the claimants' complaints, and found that the Administrative Court was not the appropriate forum to determine the complaints raised by the claimants. It accordingly refused permission for judicial review.

The court's decision was based on:

- a close consideration of the statutory scheme set up by PeA 2004 for determination whether to exercise regulatory functions, and
- an analysis of the nature of the complaints raised

Whipple J found that the complaints were all capable of being determined within that statutory scheme. In particular the judge found that the expert bodies set up by Parliament as part of that scheme were the appropriate bodies to decide issues such as The Pensions Regulator's assessment of expert evidence.

Notably, in its assessment of the statutory scheme the court stated that a warning notice need not set The Pensions Regulator's case in stone. The judge said 'a warning notice is part of the investigatory phase and it does not, at least not necessarily, represent the Case Team's final position' (at para [36]). Even at that investigatory stage, however, The Pensions Regulator was held to have an obligation to act fairly.

What are the implications of the judgment for other targets seeking to challenge The Pensions Regulator's decisions by way of judicial review?

The case shows the difficulty for claimants in obtaining judicial review of decisions of The Pensions Regulator, due to the existence within the statutory scheme of routes to challenge those decisions. Unless the circumstances are 'exceptional', then if those routes are open then they mean that claimants are likely to be refused permission for judicial review until the routes have been exhausted.

However 'exceptional circumstances' do exist. They have been found in cases where a claimant argued that its right to a fair hearing was being violated, and that a decision-maker was not acting in accordance with an established policy.

A further implication arises as the claimants made an application for specific disclosure in support of one of their two grounds. The judge said she did not need to deal with that application, due to her conclusion on alternative remedy. She held that 'disclosure is, in any event, much more appropriately considered by experts in the matters raised by WN1 and WN2, in the context of that statutory scheme' (at para [83]). The focus of all parties must therefore be on disclosure under that statutory scheme.

Interviewed by Evelyn Reid.

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