FORFEITURE IN TRUST-BASED OCCUPATIONAL PENSION SCHEMES
"6 Year, No Claim Provisions" under s.92(5)(b) Pensions Act 1995

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PART 2

In the first part of this article, we examined the legal position and caselaw relating to the forfeiture of benefits in occupational pension schemes and offered a critique. We now consider some resulting thorny issues, including what (if any) claims are available to members, some points for practitioners including what trustees should do once they become aware of underpayments, and the considerations if they wish to restore benefits after they have been forfeited.

Do affected beneficiaries have any remedies; do the trustees have any exposure?

In the case of a forfeiture provision which confers a discretion, pensioners whose time-barred arrears are forfeited could have a remedy if they can successfully challenge the exercise of the trustee's discretion as being perverse, irrational or vitiated on other grounds**.** As we said in Part One of this article, in the case of a mandatory provision, pensioners whose time-barred arrears are forfeited appear to have no surviving remedy against the trustees.

Leaving aside any "implied term" argument which is likely to be difficult to sustain, we have considered two instances in which a beneficiary might attempt to raise a defence to any attempted forfeiture even though the forfeiture is under a mandatory provision (or a default provision where no discretion subsists):

(1) *Knowing underpayment.* Where the trustee *knowingly* underpays a beneficiary a sum less than their true entitlement during all or part of the 6 year period, e.g. where the

trustee is aware that a higher sum is payable. The beneficiary ought in principle, we consider, to have a defence – pro tanto in reference to those underpayments accruing due after the trustee acquired such knowledge - to any forfeiture pursuant to s.92(5)(b) following a deliberate breach of trust, as they undoubtedly would, in a non-trust scheme to a limitation-based forfeiture pursuant to s.92(5)(a) (see s.32 Limitation Act 1980).

(2) *Miscalculation.* Where the pension is underpaid due to miscalculation, and the trustee represents that the pension is, and has been correctly calculated to be, £X, when in fact it was £X + £Y; the beneficiary, had they been aware, would (let us assume) have claimed the additional £Y: so the representation has caused them detriment by not making the claim and thereby rendering the unpaid element liable to forfeiture. Can they consequently raise an estoppel precluding the trustee from enforcing or giving effect to forfeiture provision? Counterarguments may doubtless be advanced (including, for example, an argument that something more than a mere communication that a person's pension is £X is required in order to constitute a representation that that amount is correct).

Even if sustainable in a miscalculation case, this argument is, we consider, less likely to avail the member in the all too common scenario (cp. *Axminster* or *CMG*) where the scheme has been administered on the basis of defective documentation and additional liabilities, including historic arrears, are owed. Here there is no miscalculation, and the trustee in paying the pension is representing that the pension is £X under the documentation in accordance with which the scheme is being administered for all members. It is questionable whether the trustee makes a further implied representation that the documentation is valid, and even if it does, a corrected statement would not have enabled the beneficiary to know what was their true entitlement, enabling them to make a claim for a specific sum.

Points for practitioners as to forfeiture

What is the forfeiture event?

Leaving aside individual cases of unpaid benefits (where beneficiaries are missing or contact has been lost) or underpayment of a particular benefit (e.g. due to miscalculation) for 6 or more years, the forfeiture clause is most likely to need to be considered on a scheme-wide basis in reference:

(a) to arrears of GMPE (in a formerly contracted-out scheme); or

(b) to historic arrears payable as a result of defective documentation or administration (as in *Axminster* or *CMG*).

Reviewing the scheme provision

Applying the principles outlined in Part One of this article, the starting point is to review the current scheme provisions, including the contracting-out schedule for GMP benefits:

(1) to identify any possible forfeiture provisions.

(2) to ascertain whether they are authorised by statute, or if not, whether they can be saved, wholly or in part by corrective construction, severance or rectification.

(3) to ascertain what is their scope and application to beneficiaries whose benefits are unpaid or underpaid (for example, (a) some forfeiture provisions are engaged only where there has been a mistake of fact; that might not include where there is a mistake as to the nature of a person's legal entitlement, such as where the underpayment is a result of unequalised GMP; and (b) as per the comments in Part One, it might be argued that on its particular wording the forfeiture provision does not permit

forfeiture in cases of underpayment, as opposed to non-payment of a benefit or instalment of pension).

(4) to determine which category of forfeiture clause it is (as identified in Part One) and form a view as to what, if any, discretion is conferred. Where the clause specifies how the forfeited money may be applied, it is necessary to ascertain whether this could authorise reinstatement of the forfeited benefit.

Previous documentation

It may prove necessary to review previous governing documentation: (1) to assist in construction where any issue arises as to the meaning or effect of the clause (as in *CMG*); and (2) to determine whether the forfeiture provision has been validly introduced. This is discussed below.

Amendments introducing or tightening the forfeiture provision

Statutory restrictions on modifying schemes imposed by s.67 PA 1995 do not apply to forfeiture provisions permitted by s.92[1]. Nevertheless, the amendment power may well contain an express restriction framed to protect accrued rights[2] or in other terms which call

[1] Reg.6 OPS (Modification of Schemes) Regs. 1996 (SI 1996/2517) as amended by Personal and OPS (Miscellaneous Amendments) Regs 1999 (SI 1999/3198) with effect from 30 December 1999, replaced by Reg. 3(b) OPS (Modification of Schemes) Regs. 2006 (SI 2006/759) with effect from 6 April 2006.

[2] Whilst it is possible for an express restriction to extend to future service benefits, that would be extremely unusual; the decision in *Lloyds Bank Pension Trust Corporation Ltd v Lloyds Bank plc* [1996] PLR 263 holding that a restriction on amendment "decreasing pecuniary benefits secured to or in respect of" specified members (without the written consent of 75% of them) had that effect has been distinguished in subsequent caselaw and is best regarded as confined to its own special facts.

for careful consideration as to whether the forfeiture provision, if introduced or enlarged by amendment since scheme commencement, falls foul of the restriction[3].

In *Axminster* (at 215-221) Clause 25 (which was held not to effect a forfeiture) was replaced with Rule 36 which directed mandatory forfeiture of a benefit not claimed within 6 years of becoming due, subject to a trustee discretion to pay all or part of the benefit to the beneficiary notwithstanding the forfeiture or for other purposes. The proviso to the amendment power prohibited any amendment which *"would diminish the benefits … already accrued"*. The amendment, made on 16 March 2001, applied to then active members and to payments of pension falling due after that date, including where the amount payable was affected by pensionable service before 16 March 2001. Morgan J held that the amendment did not contravene the proviso, (a) because the quantum of benefits was not diminished, and (b) because a forfeiture only arose if the beneficiary failed to claim arrears for 6 years; while that *might* happen, it could not be said that it *would* happen. This reasoning would, we think, also probably extend to the formulation "would reduce the value of". Morgan J acknowledged that had the restriction been expressed in the terms *"might adversely affect"* the beneficiary's accrued rights, he would have held that the amendment did contravene the restriction. This is significant, because express restrictions are not uncommonly expressed in those terms.

So practitioners reviewing past amendments where the amendment power is subject to an express restriction should ask themselves:

(1) Does the amendment purport to apply to pre-amendment service or not?

(2) If the answer to (1) is yes, does the amendment purport to apply to pre-amendment instalments of pension or not?

(3) If the answer to (1), or to (1) and (2), is yes, does it contravene the restriction?

[3] If the express restriction requires an actuary's certificate, stated to be final and binding, and that was given, the amendment will be valid, but in the discussion below we assume the restriction does not provide for this.

(4) If so, can the amendment nevertheless be given effect (if (1) causes the contravention, by severance or construing it as confined to benefits accruing from post-amendment service; if (2) causes the contravention, by construing it as confined to post-amendment instalments of pension)?

Has there been a forfeiture event? If there is a discretion, is it still exercisable?

A permissive clause (category (1)) leaves the initiative with the trustees who will have a duty to consider the exercise of their discretion. We consider that they should do so in accordance with the principles set out in *Axminster*.

A default clause (category (2)) gives the trustees discretion not to forfeit at least before the expiry of 6 years. A permissive power cannot be exercised out of time: *Breadner v Granville Grossman* [2001] Ch 523. Unless (which is unlikely) the clause extends the period of pre-forfeiture discretion beyond 6 years, or requires a prior decision of the trustees before the forfeiture takes effect, the arrears unclaimed will be forfeited. This seems unsatisfactory in the context of underpayments which come to light 6 or more years later, as the trustees will never have had the opportunity to consider exercising their discretion. It may be that a discretion could be construed as hybrid, i.e. exercisable before or after forfeiture, thus enabling the trustees to effect post-forfeiture reinstatement: take, for example, a clause which stipulates *"Except where determined otherwise by the Trustees any moneys not claimed under the rules within 6 years of their becoming payable shall thereafter no longer be claimable".*

A mandatory clause (category (3) or (4)) will perforce take effect after expiry of the time limit. If there is a post-forfeiture discretion enabling reinstatement, subject to the terms of the clause, it may we consider be possible to exercise this, despite the lapse of significant time since the forfeiture event: this may be useful in practice.

Position once trustees aware of underpayments

Once the trustees are aware that there have been quantifiable underpayments of benefit, they will plainly have to notify the beneficiaries concerned and make arrangements to pay the corrected benefits. They will then have to decide on the appropriate course of action with reference to any forfeiture provision which is based on claims not having been made. The following issues arise:

(1) *Stopping the clock on claims*

The trustees would, we consider, be guilty of fraudulent or deliberate breach of trust if they knowingly allowed the underpayments to continue and then relied on the forfeiture provision to forfeit more of the instalments. If that is right, it should be incumbent on them promptly to "stop the clock" by deciding, and making clear, that claims are treated as having been made at a stated date. In *CMG* the date agreed on as to when claims were treated as having been made was 1 October 2019. In *Lloyds 1* the relevant date was 26 October 2018 (date of judgment determining that there was liability). In principle, the date ought, we consider, to be not significantly later than when the trustees (or possibly when their agents, e.g. the administrators) first become aware of the underpayment or the matters giving rise to it.

(2) Have any claims been made?

The trustees will of course have to notify beneficiaries as respects any forfeiture of arrears down to the relevant cut-off date and in doing so, they should at least make them aware that the arrears are being forfeited on the basis that no claim has been made for the underpayment, and that if any beneficiary wishes to demonstrate that they did make a claim before the cut-off date, they should provide evidence to the trustees.

It appears from *CMG* that standard documentation completed by a member when the pension is put in payment is very unlikely to be construed as a claim for the underpaid benefit. Nevertheless, as this is fact-specific, it would be a prudent precaution for trustees

and their advisers at least to review the standard documentation in case it is in unusual terms which could be argued to constitute a claim.

The trustees would not, we consider, be under any duty to review individual member files, particularly if they have put beneficiaries on notice that it is for them to provide evidence of any claim having been made, except that such a duty might arise in respect of other members in the same cohort as a member whose file is known to contain relevant information.

(3) Should members be advised/encouraged to make a continuing claim for payment?

Trustees are under no duty to proffer advice to the members as to the making of claims. Were they to do so, some employers might voice concerns that this ran counter to the supposed objective of the forfeiture provision, to prevent stale claims.

A member can, it seems, deprive s.92(5)(b) and forfeiture provisions made under it of all force as respects underpayments by the simple expedient of writing to the trustees claiming payment of "all those sums which you have failed to pay me or may in future fail to pay to me". Leech J acknowledged in *CMG* that such a communication, even in advance of the forfeiture event, would be effective as a continuing claim. A member-friendly organisation such as Pensionswise might consider the merits of promulgating such advice to members in order to protect them against the unfair consequences of forfeiture of underpayments. However, this could only operate for the future; most defined benefit schemes are closed to accrual and the issues mainly arise in relation to historic arrears. It will therefore be of no avail to members in cases concerning GMPE arrears accrued down to 26 October 2012 or underpaid arrears now 6 or more years overdue which have been caused by historic defective administration of the scheme.

Restoration of benefits after a forfeiture event

In the context of both GMPE arrears and underpayments caused by defective administration, trustees may well wish, where they can, to avoid having to forfeit the underpaid arrears. However, a default clause if there is no surviving discretion, or a mandatory clause, will have to be given effect, in the absence of any claim having been made. The question then arises whether any steps can be taken to restore the benefit. There are the following possibilities:

(1) There is a post-forfeiture discretion which in terms enables reinstatement of the benefit, wholly or in part.

(2) The clause authorises the application of money for the benefit of members/beneficiaries in terms sufficient to include the affected beneficiary. Clear language would however be likely to be required for the trustees to rely on this interpretation.

(3) The scheme will generally contain a power of augmentation, usually subject to the employer's consent. If so, unless this contradicts anything in the forfeiture clause, the augmentation power could be exercised to reinstate the benefit.

(4) A final possibility could be a retrospective amendment to include a post-forfeiture discretion to reinstate, if there is none.

In the event of post-forfeiture reinstatement or augmentation, careful consideration will need to be given by trustees as to any tax implications (for example, can the reinstated benefit be regarded for tax purposes as the continuation of a single benefit; if not on what basis can any arrears be paid as authorised payments?). A more detailed consideration of the tax implications is beyond the scope of this article.

Whilst some employers may take a hardline approach, as CMG did, employers properly conscious that the scheme was established to pay the benefits earned by service will surely bear in mind that it is unfair, and almost certainly was not intended by Parliament, that beneficiaries in receipt of pension wrongly underpaid and unaware of their true entitlement, should have their underpaid arrears forfeited when they had no opportunity to

make a claim. On that basis, employers may be willing to co-operate with trustees in facilitating the restoration of benefits to the underpaid members, thus avoiding the egregiously unjust consequences of forfeiture under s.92(5) Pensions Act 1995 when applied to underpayments of which beneficiaries are unaware.

In the light of *CMG*, a caveat must be sounded to trustees contemplating any remedial payment to beneficiaries arising from errors in the administration of the scheme. Care must first be taken to consider the position as respects any arrears which may be forfeit, and to endeavour to resolve the position, where possible with the employer's concurrence, in advance of any remediation.

There is also the question of what to do in a case such as *CMG* where remediation has been made including arrears that, it is subsequently discovered, are subject to forfeiture. Such a discovery might be made in the context of a due diligence exercise as part of preparation for a scheme buy-out. Following *CMG*, if there is no trustee discretion to prevent forfeiture or to reinstate, the employer is likely to be within its rights to require recoupment (e.g. by way of set-off against future instalments) of the forfeited arrears. Before such a transaction takes place the trustees and the employer will need to decide whether the strict application of the forfeiture rule can be avoided, and if not the basis on which recoupment will not be sought (e.g. reinstatement of the original benefits or augmentation back up to that same level), taking into account any attendant tax issues.

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