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...Sections 91 to 92 of the Pensions Act 1995

By John Grocott-Barrett

The statutory regime applying to the alienation and forfeiture of benefits from an occupational pension scheme is in theory well known in the pensions industry, but in practice regularly causes problems. In that context, this article on ss. 91 and 92 of the Pensions Act 1995 (“**PA 1995**”) is intended both to provide a general refresher (or introduction) to the regime and point to various issues which can crop up.

Section 91

The basic principle

The basic principle is set out in s.91(1), which provides:

“Subject to subsection (5), where a person is entitled to a pension under an occupational pension scheme or has a right to a future pension under such a scheme—

- (a) the entitlement or right cannot be assigned, commuted or surrendered,*
- (b) the entitlement or right cannot be charged or a lien exercised in respect of it, and*
- (c) no set-off can be exercised in respect of it,*

and an agreement to effect any of those things is unenforceable.”

As is evident, s.91 only applies to an ‘occupational pension scheme’. This is a term defined in s.1 of the Pensions Schemes Act 1993 (“**PSA 1993**”), which since 31 December 2020 has provided that:

“(1) In this Act, unless the context otherwise requires ...

'occupational pension scheme' means a pension scheme—

- (a) *that—*
 - (i) *for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or*
 - (ii) *for that purpose and also for the purpose of providing benefits to, or in respect of, other people,**is established by, or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to whom that subsection would have applied when the scheme was established had that subsection then been in force, or a pension scheme that is prescribed or is of a prescribed description;”*

(2) *This subsection applies—*

- (a) *where people in employments of the description concerned are employed by someone, to a person who employs such people,*
- (b) *to a person in an employment of that description, and*
 - (c) *to a person representing interests of a description framed so as to include—*
 - (i) *interests of persons who employ people in employments of the description mentioned in paragraph (a), or*
 - (ii) *interests of people in employments of that description.*

In *Parlett v Guppys (Bridport) Ltd (No 2)* [2000] Pens LR 195 (CA), the question was whether the company was entitled to set-off the claimant's liability under various costs orders against its liability to pay pension instalments. The claimant relied on s.91(1)(c) to argue that what the company sought to do was impermissible. The company denied that s.91 had any applicability, since it argued that what the claimant benefitted from was a 'personal pension scheme', not an 'occupational pension scheme' because the Company argued that the pension was not paid to a person with qualifying service in employment.

Chadwick LJ analysed the provisions of PSA 1993 s.1 which were then in force and taking “*the view that 'occupational pension scheme' should be construed liberally and not restrictively*” ([31]) he held

that the tests identified in the definition of occupational pension scheme were satisfied so that s.91(1) of the PA 1995 provided a bar to any claim to set off the company's entitlement to costs ([34]).

Another illustration of the basic principle can be seen in *Fisher v Harrison* [2003] EWCA Civ 1047. In that case, a consent order which sought to discharge a debt owed to a company by the debtor forfeiting or assigning certain pensions rights was made without consideration of s.91. In consequence, the consent order was of no effect insofar as it covered future pension instalments ([34]) and had to be set aside in its entirety ([35]-[36]).

Similarly, in *R v Sharif* [2022] EWCA Crim 215, a criminal compensation order made on the basis that an occupational pension scheme entitlement held by a defendant was such that money was available and compensation could be imposed was quashed. The sentencing judge appeared to have proceeded erroneously on the basis that the current value of the pension entitlement was available to pay a gross amount to the victims. However, the operation of s.91 meant that it was not permissible to treat future entitlements as a cash sum presently available to discharge a compensation order.

"Right to a future pension"

As is also evident from the language of s.91, it applies where a person is "*entitled to a pension*" or has a "*right to a future pension*".

In *The Pensions Regulator v Baxendale-Walker* [2014] EWHC 1378 (Ch), the High Court considered the meaning of "*right to a future pension*". That case involved so-called 'pension liberation schemes' which ostensibly took advantage of loopholes in the statutory pensions and tax regimes. On a preliminary issue trial, it was held that the beneficial interests of members were void for uncertainty.

Nonetheless, Rose J also held that (if contrary to her finding on uncertainty, she had considered the schemes were not void) the beneficial interests of members declared by the deeds constituted a

“right to a future pension” and therefore could not be alienated except in prescribed circumstances ([36]). Mr Baxendale-Walker had argued that members did not have a right to any pension as the payment of a pension was at the trustees' discretion. The only right they therefore had was to be considered as a potential object of the trustees' exercise of discretion, and therefore they could surrender their rights as objects. This was rejected by Rose J who noted at [32] that Mr Baxendale-Walker's Defence had referred to the trustees' discretion about the *amount* of the pension payable but not to any discretion as to whether to provide the pension. She concluded at [35]-[36] that the deed as drafted did not grant the trustee a discretion whether not to provide a pension, and therefore the members' entitlement did constitute a *“right to a future pension”*.

In *Bradbury v BBC* [2017] EWCA Civ 1144, the Court of Appeal was asked to consider whether a cap on pensionable pay (**“the Cap”**) infringed s.91. The appellant had argued that s.91 was intended to protect not just the accrued value of the appellant's pension, but also what the pension might become worth in the future. Nonetheless, at [45], Gloster LJ agreed with the respondent: s.91 protects actual, accrued rights of employees - s.91(1) applies where a person *“has a right to a future pension”*, not where a person *may* acquire future rights to a pension. It followed therefore that s.91 had no application to the appellant's agreement to the Cap, since s.91 only prevented the surrender of rights under the pension scheme, not a change to the content of the appellant's employment contract ([48]).

Exceptions

Subsections (5)-(7) to s.91 include certain exceptions, which should be read together with the Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997 (**“the 1997 Regulations”**), regs. 2-4, 7 and 8.

In summary, the permitted methods of alienation are as follow:

- (1) An assignment in favour of the member's surviving spouse, civil partner or dependant: s.91(5)(a) PA 1995.
- (2) A surrender at the member's option for the purpose either of providing benefits for his or her surviving spouse, civil partner or dependant or for acquiring for the member concerned an entitlement to further benefits under the scheme: s.91(5)(b) PA 1995.
- (3) Commutation of benefits for a lump sum payable either on or after retirement or in exceptional circumstances of serious ill-health (s.91(5)(c)(i) PA 1995), or in other prescribed circumstances which include permission by the "lump sum rule" and "lump sum death benefit rule" and qualification as a "trivial commutation lump sum" or "trivial commutation lump sum death benefit" for the purposes of the Finance Act 2004: reg. 2(a)(i)-(ii) of the 1997 Regulations.
- (4) The operation of a charge, lien or set-off against the member's benefits for the purpose of enabling the employer to discharge a monetary obligation due to the employer and arising out of a criminal, negligent or fraudulent act or omission committed by the member against the employer: s.91(5)(d), reg. 3 of the 1997 Regulations; see also reg. 7 in respect of public service schemes and the Armed Forces Pensions Scheme.
- (5) The operation of a charge, lien or set-off against the member's benefits for the purpose of enabling the scheme trustees to discharge a monetary obligation due from the member to the scheme arising out of a criminal, negligent or fraudulent act or omission on the part of the member or, in the case of a trust scheme of which that individual is a trustee, arising out of a breach of trust by him: s.91(5)(e) PA 1995. However, s.91(5)(e) does not apply where the Court has relieved the person in question wholly or partly from personal liability under section 61 of the Trustee Act 1925 or section 32 of the Trusts (Scotland) Act 1921: reg. 4 of the 1997 Regulations.
- (6) The operation of a charge, lien or set-off against the member's benefits where a monetary obligation to the scheme has arisen due to a pension payment made in error: s.91(5)(f) and s.91(6) PA 1995.

The operation of s.91(5)(f) and s.91(6) PA 1995 on overpaid benefits has been considered judicially as follows:

- (1) In Burgess v BIC UK [2018] EWHC 785 (Ch), there was consideration at [163]-[168] of the provisions in s.91(6) that where there is a dispute as to the amount of overpayment, 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. Arnold J said at [168] that a determination of the Pensions Ombudsman does not constitute an order of a competent court, because the Ombudsman is not a court. An order by the County Court pursuant to s.150(5)(a) of the PSA 1993 would constitute an order of a competent court.
- (2) There was uncertainty as to whether Arnold J's dicta represented *ratio decidendi* or were *obiter* (the Pensions Ombudsman regarded it as *obiter*).
- (3) Nonetheless, the position was confirmed in CMG Pension Trustees v CGI IT UK [2022] EWHC 2130 (Ch). After considering the point at [145]-[160], Leech J concluded that the Pensions Ombudsman is not a "competent court".

By s.91(7), however, the exceptions are subject to s.159 of the PSA 1993 (which provides for the inalienability of the guaranteed minimum pension).

Bona fide compromises

Notwithstanding the basic principle and cases such as Fisher v Harrison (above), s.91 will not necessarily apply to bona fide compromises.

In HR Trustees Ltd v German [2010] EWCA Civ 1349, the Court of Appeal held that s.91 is directed to cases of the deliberate giving up on an actual existing entitlement or right ([27]), and therefore did not prevent the parties from entering into, and the Court from approving, a bona fide compromise of doubted or disputed rights under an occupational pension scheme (which would otherwise have to be established by legal determination) ([29]).

The basic analysis in *HR Trustees Ltd v German* was also confirmed in *Bradbury v BBC* [2012] EWHC 1369 (Ch), [82]-[84] (Warren J) and [2017] EWCA Civ 1144, [45] (Gloster LJ).

Building upon these points, in *Gleeds (Head Office) v Briggs* [2016] EWCA Civ 1284, the Court of Appeal had to consider the position where its ruling was sought as to whether a compromise requiring members to give up additional benefits that they were putatively entitled to due to the invalid execution of certain deeds in return for the nominal sum of £100 would fall foul of s.91. The Court of Appeal was bound by *HR Trustees Ltd v German*. The compromise would not be invalidated by s.91, since although any compromise had to be entered into in good faith, the nominal consideration did not undermine the validity of the compromise. As Lewison LJ noted at [6], the real consideration was the giving up by each party of the right to pursue the dispute to an adjudication by the court.

Section 92

Basic principle

The basic principle is set out in s.92(1), which provides a general rule that *“an entitlement to a pension under an occupational pension scheme or a right to a future pension under such a scheme cannot be forfeited.”* By s.92(7), *“references to forfeiture include any manner of deprivation or suspension.”*

Exceptions

The exceptions can be found in s.92(4)-(6), s.93 and regs. 5-6 and 8 of the 1997 Regulations. In summary, they are as follows:

- (1) A transaction or purported transaction which under s.91 is of no effect, whether or not that event occurred before or after the pension became payable: s.92(2)(a) PA 1995.

Nonetheless, if forfeiture occurs as a result of a transaction or purported transaction which under s.91 is of no effect, then the trustees are permitted, if they so determine, to pay the pension which would have been payable but for the forfeiture to all or any of:

- (a) The member to whom the pension was (or would have become) payable: s.92(3)(a) PA 1995.
 - (b) The member's spouse, civil partner, widow, widower or surviving civil partner: s.92(3)(b) PA 1995.
 - (c) Any dependant of the member: s.92(3)(c) PA 1995.
 - (d) Any person to whom, under the rules of the scheme, the pension was or could have been paid: s.92(3)(d) PA 1995 and reg. 5 of the 1997 Regulations.
- (2) A member being convicted of certain offences which are committed before the pension becomes payable (including treason and offences contrary to the Official Secrets Acts): s.92(4) PA 1995.
- (3) A member's failure 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: s.92(5) PA 1995. On the scope of this provision, see the next subsection.
- (4) Where a pension is payable to a member's surviving spouse, civil partner or dependant or other person nominated under the scheme rules, and that person is convicted of the murder, manslaughter or unlawful killing of the member: s.92(6) PA 1995 and reg. 6(1)(a) of the 1997 Regulations.
- (5) Where a person to whom a pension is or would have been payable has caused a monetary loss to the scheme as a result of (a) a criminal, negligent or fraudulent act or omission, or (b) in the case of a trust scheme of which the person is a trustee, a breach of trust: s.92(6) PA 1995 and reg. 6(1)(b) of the 1997 Regulations.
- (6) Where a person to whom a pension is or would have been payable is under a monetary obligation to the employer as a result of a criminal, negligent or fraudulent act or omission:

s.93(1) PA 1995. Forfeiture pursuant to s.93(1) is subject to similar restrictions to those under s.91(6) so that e.g., by s.93(3) forfeiture must not take effect where there is a dispute as to the amount of the monetary obligation in question, unless the obligation has become enforceable under an order of a competent court or in consequence of an award of an arbitrator.

Failure to make a claim exception: s.92(5)

The application of s.92(5) has been subject to various judgments:

(1) In Lloyds Banking Group Pensions Trustees v Lloyds Bank [2018] EWHC 2839 (Ch), rulings were sought in relation to the equalisation of guaranteed minimum pensions. Morgan J noted at [417] that s.92(5) related to “a claim for a pension” and that “pension” was defined by s.94(2) to include any part of a pension or any payment of a pension. He also noted at [419] that it had been conceded that s.92(5) was not restricted to a case where the claim was made by the issue of legal proceedings claiming payment of the arrears. He concluded at [417]:

“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 s.92(5) and a rule which provided for forfeiture after six years would be a valid rule for the purposes of s.92.”

(2) In Punter Southall Governance Services Limited v Hazlett [2021] EWHC 1652 (Ch), Morgan J held that although the language of s.92(5) opened with the words “by reference to a failure by any person to make a claim for pension”, the subsection when read as a whole did not require fault on the part of the beneficiary, but simply that either s.92(5)(a) or (b) were engaged (so that a rule which introduced the automatic forfeiture of unclaimed arrears was permissible): [208]-[214].

(3) Morgan J’s analysis in Punter Southall Governance Services appears to be in accord with Leech J’s analysis in CMG Pension Trustees v CGI IT UK [2022] EWHC 2130 (Ch), [119] where the judge said “There is no suggestion that forfeiture clauses are only permissible where the claimant has actual knowledge of the claim.”

Interaction of ss.91-92 with s.67

One interesting question is how ss.91-92 interact with s.67 PA 1995. S.67 includes the subsisting rights provisions, but by s.67(2) a detrimental modification to members' entitlement is permissible if the consent requirements in s.67B are met.

Arguably these two schemes are at odds, and it is sometimes said that there is divide among practitioners about the proper interpretative approach.

Nonetheless, it seems that the tension is resolved by the Occupational Pension Schemes (Modification of Schemes) Regulations 2006 ("**the Modification Regulations**"). By reg 3:

- (a) Assigning, commuting, surrendering or charging any or all of a member's or spouse's subsisting rights, or exercising a lien or set-off in respect of them falls outside the scope of s.67, provided that such modification is not prohibited by s.91, any other enactment or rule of law.
- (b) A modification providing for any or all of a member's or survivor's subsisting rights to be forfeited falls outside the scope of s.67, provided that such modification is not prohibited by s.92, any other enactment or rule of law.

Taxation issues

Under the various provisions of the Finance Act 2004, if a pensions scheme makes an unauthorised payment, the member incurs a tax liability (sometimes the scheme does too).

Sections 172 and 172A create significant risks for those contemplating an assignment (other than pursuant to a pension sharing order or provision) or surrender of benefits or rights to which a member has an actual or prospective entitlement under the pension scheme. These provisions should be considered carefully, and expert tax advice should be sought.

Open questions

There remain a number of open questions on the operation of ss.91 and 92. Outstanding issues include:

- (1) Whether as a matter of principle, the recoupment of benefits which have already been (over)paid (as opposed to the alienation of benefits in accordance with s.91(5)(f) and s.91(6)) falls within s.91(1) as a set-off.
- (2) How to demarcate ss.91 and 92. As noted above, by s.92(7), references to forfeiture in ss.92-93 include “*any manner of deprivation or suspension.*” Presumably that does not include assignment, commutation, surrenders, charges, liens or set-offs which are subject to s.91, but what exactly is the dividing line between the two? The point is not academic, as the exceptions relevant to each section differ.
- (3) Returning to the interaction between ss.67 and 91-92, are amendments which might otherwise infringe ss.91-92 (and which fall outside regs. 3(a) and (b) of the Modification Regulations) valid if they otherwise comply with s.67? From a practitioner’s perspective, it may simply be easiest to draft around the problem: I note for instance that many modifications which involve the surrender of certain entitlements, also involve acquiring other benefits, something which can be permissible pursuant to s.91(5)(b).

John Grocott-Barrett is a barrister at Wilberforce Chambers

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