

news

Pensions Ombudsman orders Trustees to disclose legal advice

What should you do when a member requests a copy of legal advice given to trustees? A recent Ombudsman determination on the subject (*Cameron v The Trustees of the Digital Equipment Company Pension Plan*¹) indicates that trustees may ultimately be directed to disclose it. The outcome also suggests that the Ombudsman is prepared to look beyond traditional objections to disclosure of trust documents.

The Ombudsman's determination

Trustees exposed?

- Trustees' legal advice is not automatically protected from disclosure to members.
- Curious (or even hostile) members may potentially be able to gain access to a wider range of documents as a result of the Ombudsman's determination.
- The key question is likely to be "are there any grounds for refusing a member's request?"

The complaint

At a glance

- Mr C had referred a previous complaint to the Ombudsman concerning a transfer value quote provided in 1993. The complaint was not upheld.
- He then sought disclosure of legal advice given to the Trustees around the time of the quote regarding the application of early retirement reduction factors under the scheme rules.
- The Trustees objected to disclosure.

The Trustees' arguments...

...against disclosure

- The advice would indicate the reasons for the Trustees' decision concerning the transfer value quote in 1993.
- The advice was a legally privileged communication.
- Seeking disclosure was an abuse of process because the member's previous complaint against the Trustees was not upheld.
- Disclosure would therefore serve no purpose.

¹ Determination number: M00949

The Ombudsman's conclusions

And the reasons

- The advice did not concern an exercise of the Trustees' discretion or the reasons for the decision. It related to legal advice on the operation of the scheme rules.
- The Court has an inherent equitable jurisdiction over trustees to order disclosure to beneficiaries of documents relating to the administration of a trust².
- It would not be an abuse of process to allow disclosure.
- The Ombudsman had to weigh the arguments for and against disclosure and found in favour of the member.

Legal privilege?

Effect on disclosure

- Although the nature of the legal advice given was confidential and privileged, that was not of itself sufficient to prevent disclosure to a beneficiary.
- In addition, the Trustees could not rely on litigation privilege because there was no real possibility of proceedings against them when the advice was given.

Refusing disclosure request?

When might this be possible?

- Examples of situations in which it may still be possible to refuse disclosure include where:
 - litigation privilege applies;
 - the request is unreasonable;
 - the advice is not relevant;
 - the advice contains personal or confidential data about other members.

Conclusion

The wider ramifications

- For trustees averse to providing copies of advice to members this decision may come as a surprise.
- There seems no logical reason to confine the decision to legal advice, with other professional advice given to trustees equally in the frame.
- Trustees will need to consider each specific request for disclosure of scheme advice in context (and probably with advice). Trustees should beware adopting a blanket (refusal) approach.

² Based on the Privy Council's decision in *Schmidt v Rosewood Trust Limited* (2003)

This edition of Sackers Extra News has been produced by our Dispute Resolution Unit to help you keep abreast of developments in pensions litigation. As specialists in a niche pensions practice our Dispute Resolution Unit has unrivalled knowledge and experience of the issues facing pension fund trustees.

If you would like further information about this determination by the Pension Ombudsman and the disclosure of legal advice please contact us.

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