

## Pensions & Investment Litigation Briefing

December 2019

Sackers' Pensions & Investment Litigation team reviews recent case law and developments, examining the practical lessons for trustees and employers



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## Abbreviations

**CA:** Court of Appeal

**CJEU:** Court of Justice of the European Union

**GMP:** Guaranteed Minimum Pension

**HMRC:** HM Revenue & Customs

**LGPS:** Local Government Pension Scheme

**NPA:** Normal pension age

**QROPS:** Qualifying recognised overseas pension scheme

**TPO:** The Pensions Ombudsman

**TPR:** The Pensions Regulator

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## Overview

“The Pension Schemes Bill 2019-20 was long awaited, finally arriving mid-October (rather than the May we had originally hoped for). And it went nearly as soon as it came, falling with the dissolution of Parliament before the Election. However, whoever is in power after 12 December, we would expect the measures the Bill has outlined to progress.

Amongst the changes contained were those designed to strengthen TPR’s powers in its push to be clearer, quicker and tougher. Page 3 highlights the key proposals.

This year has offered us some reminders that class actions continue to make the news, and trustees should bear them in mind. Read more in our spotlight on page 4.

Page 5 takes a look at the complex issue of forfeiture in the light of the Lloyds verdict on GMP equalisation.

On page 6 we look at the CJEU’s ruling in the Safeway case. Whilst the litigation is not over yet, the CJEU has also raised an important point in relation to potential objective justification, and it will be interesting to see if this argument is run when the matter returns to the national courts.

Finally, we round off this edition with a selection of recent determinations from the Ombudsman, with transfers and overpayments still proving hot topics.

With best wishes for the festive season and 2020.”



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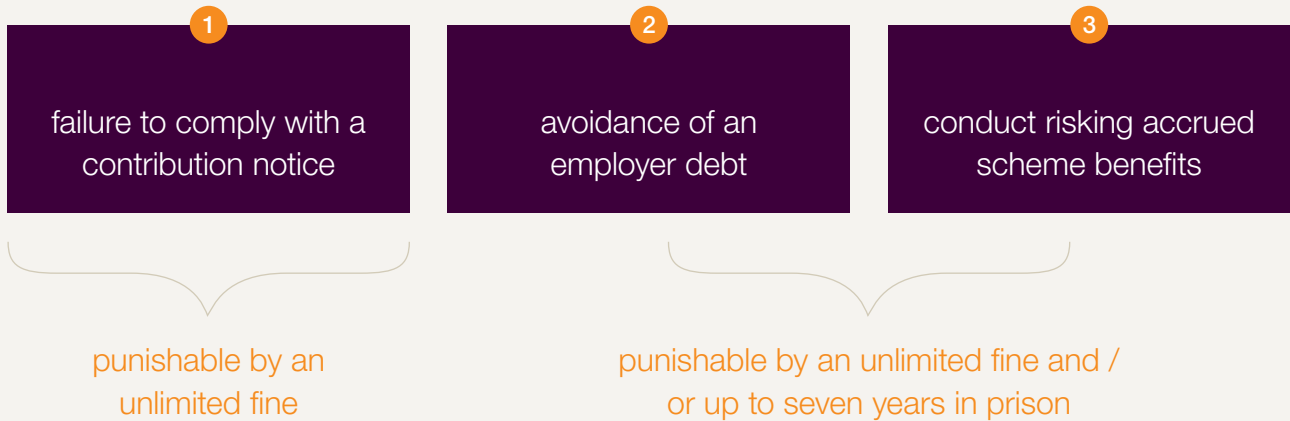
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# Pension Schemes Bill: TPR's powers

The Pension Schemes Bill 2019-20 received its first reading in October. Although with the imminent General Election the Bill's future is not certain, as it has cross party support we would expect it to be resurrected in similar form in 2020.

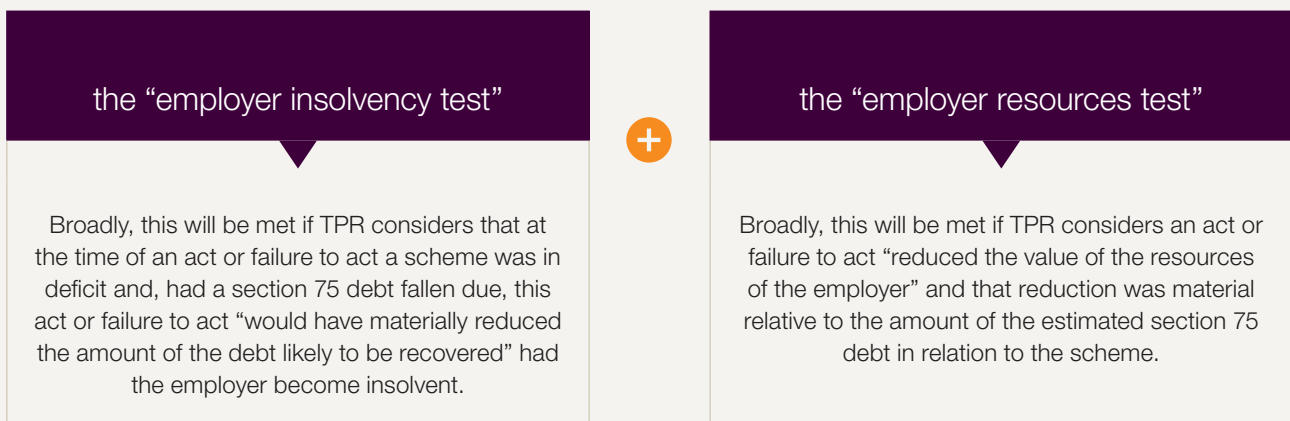
A key feature of the Bill is the extension of TPR's powers. The promise of a "stronger TPR", enabling it to be "clearer, quicker, and tougher" would be fulfilled by the introduction of the following new **criminal offences**:



TPR will have power to impose a **civil penalty** of up to £1 million:



The Bill introduces two new tests for imposing a contribution notice:



In addition, the Bill lays the groundwork for changes to the notifiable events regime and extends TPR's information gathering powers.

For further detail on the [Pension Schemes Bill](#) (as it stood in October), see our Alert.

# Class actions: a reminder

A class action is a legal procedure (originating in the US) for combining multiple claimants and claims in a single legal action. The named claimants in the class action represent a class of people with similar interests.

Class actions now occur throughout the world. Although the general principles remain largely the same, the particular rules governing them can vary quite significantly. In England and Wales, class actions are known as “group litigation”.

For pension scheme trustees, the most relevant types of class actions typically concern financial services / securities fraud in which shareholders allege that they have suffered financial loss as a result of corporate fraud or breaches of securities law. The “class” in such cases are the shareholders who purchased or owned shares during the period of alleged fraud or breach of securities law.

## Key considerations

Once trustees are informed of a class action, they should consider the advantages and disadvantages of participating in it. Trustees should, with support from their advisers, take into account a number of key considerations when reaching their decision:



### The size of the loss

Often the most important factor and is likely to influence the rest of the trustees’ decision making. In the context of the overall assets of the fund, what do the trustees regard as significant and therefore worth pursuing?



### The prospects of success

Trustees should request a copy of Counsel’s Opinion (if available) or a summary of any legal advice obtained on the merits of the class action to ensure there are reasonable prospects of success.



### Complexity of the claim and impact on resources

Trustees should try and assess at an early stage the complexity of the claim. This may include how many parties and how many issues are involved.

At the same time, trustees will wish to consider the possible impact on their (limited) resources in order to ensure minimal impact on the management of the scheme. Such considerations may include any direct cost of joining the action, and any potential liability for other parties’ costs, as well as the time involved in document review, locating evidence and taking advice.



### Risks involved

Trustees will wish to be satisfied about the financial risk to the scheme of participating in the class action, and should look to cap their costs.

Reputational risk is also a factor to consider, as participation in a class action can be a matter of public record.



### Conflict of interests

Is there any conflict of interest in pursuing action against a company, particularly if the scheme still has an investor relationship? If court action or its settlement could affect the long-term value of the shareholding, this could be a relevant consideration.

## Keep it on the agenda

A right to participate in a class action is a potential asset of a pension scheme. Many trustees therefore engage with their investment managers and custodians to establish, where possible, a reporting process to alert them of potentially relevant class actions and to monitor them.

# GMP equalisation and forfeiture

The 2018 ruling in the [Lloyds](#) case made clear the need to equalise for the effect of GMPs. The judgment left some questions unanswered, and we await a hearing “on the question of past transfers-out” in Spring 2020, for example.

Amongst the questions that the initial hearing did address was that of forfeiture of past underpayments of pensions, when full entitlements have not technically been claimed by members. The Court determined that trustees would not be able to rely on a defence under the Limitation Act 1980 where members claim recovery of arrears, however late in the day – but that forfeiture under the rules is a different issue...

## Basic position:

- Members are entitled to arrears where they have been underpaid
- No bar exists generally to prevent a claim for back payments
- If a scheme's rules have no forfeiture clause, then there is no time bar
- However, if there is a forfeiture clause, this may prevent claims for underpayments more than six years old, or give discretion over their payment.

## Check your rules:

- As with all rules, the exact wording of any forfeiture clause is imperative. Trustees should check their wording, and take advice:
  - from what point does the forfeiture time bar operate?
  - does the forfeiture apply to whole past instalments or does it cover partial non-payments?
  - does forfeiture apply only if there is a specific reason why the member failed to claim the pension (eg, they could not be traced)?
- Do the rules give a power to amend (or even introduce) a forfeiture clause?

## Exercise of discretion:

- What if the forfeiture clause contains a discretion to pay historically underpaid pensions?
- Discretion should be exercised on this issue as it would be for any other discretion, taking into account all relevant (and no irrelevant) considerations in reaching a reasonable conclusion
- Considerations specific to GMP equalisation could include:
  - fairness on members who would never have known there was a need to claim in relation to GMP equalisation until the Lloyds case
  - the potential impact on members who don't have service in the GMP equalisation window
  - the purpose of the forfeiture clause.

## Conclusion

How trustees deal with arguments from members or employers about claims for arrears of pensions and forfeiture is a novel question for many, and much will depend on the specific wording of individual schemes' forfeiture provisions. Discussion between trustees and employers will be vital. And where rules give trustees a discretion, they will undoubtedly come under scrutiny for the decisions they make, and must take care in any approach to its exercise.

Forfeiture is a good illustration of the complexity of GMP equalisation as a whole, raising as it does difficult legal and practical points to grapple with in just one of the areas for consideration.

## Key case: Safeway v Newton

The CJEU has ruled that EU law prevents retrospective levelling down even where permitted as a matter of domestic law – unless “exceptional” circumstances apply.

### Background



In October 2017, the CA referred a question to the CJEU regarding a scheme's ability to equalise its retirement ages retrospectively.

The CJEU has now given its judgment, following the [Advocate General's earlier opinion](#). It concluded that, in the absence of an objective justification, the prohibition under EU law on retroactive levelling down applies even when the rules of a pension scheme permit retrospective amendment – as they did in this case.

### Judgment



This case concerned the date on which NPA was equalised under the Safeway Pension Scheme at 65 for both men and women (having been 65 and 60 respectively).

Safeway (the principal employer) argued that equalisation occurred on 1 December 1991, the date notified to scheme members in written announcements. From that date, the scheme was administered on the basis that this change had been made. The scheme's power of amendment was widely drafted to allow retrospective effect, including back to the date of any prior member announcement, and a deed of amendment dated 2 May 1996 stated that the change had retrospective effect to December 1991.

The CA found that the scheme's rules needed to have been amended by deed, rejecting Safeway's argument that the 1991 announcement alone was effective to equalise NPAs. In October 2017, the CA referred the question of whether the deed's retrospective amendment breached EU equal treatment legislation to the CJEU.

Since it had not been argued before the CJEU that the measure concerned was warranted by an overriding reason in the public interest, the CJEU found that no objective justification was made out. It concluded that “it is nevertheless for the referring court to verify that such is the case”. The case will now return to the CA to conclude matters and to make any decisions on costs. With £100m at stake, we will watch with interest to see if this argument is now made.

### Sackers' verdict



The case is a reminder that not all equalisation questions have been answered, or all schemes' equalisation issues fixed, nearly three decades on from [Barber](#). The requirement for schemes to equalise for the effect of GMPs following the Lloyds case may also act as a catalyst for a review of Barber equalisation for some schemes.

Schemes who may be in a similar position to Safeway should pay attention to what happens when the case returns to the CA. This is especially so if arguments are made concerning objective justification for the retrospective amendment of retirement ages.

# TPO autumn round-up

## Ms N (PO-22236)

### TPO orders transfer where provider delay caused unauthorised payment

TPO has **upheld a member's complaint** that her transfer had not taken place when it should have done because of acts and omissions by her pension provider. Had this delay not occurred, Ms N's transfer could have been made while the receiving scheme was still on HMRC's QROPS list.

TPO ordered the provider to make the transfer and cover the member's unauthorised payments charge, alongside a payment for distress and inconvenience. In addition, TPO directed them to calculate whether the member would have received a higher investment return had her investments been transferred at the desired date, and pay any resulting investment loss from its own funds.

## Mrs H (PO-21489)

### Failure to carry out proper due diligence on a transfer

TPO has **found** that Hampshire County Council failed to carry out proper due diligence before it transferred a member's benefits from the LGPS Hampshire Pension Fund to the Focusplay Retirement Benefits Scheme, and ordered it to reinstate her benefits.

On the facts, TPO concluded that Mrs H did not have a statutory right to transfer: when the transfer was made, Mrs H had no employment earnings and could not therefore be an "earner", and therefore could not under the legislation acquire "transfer credits" in the new arrangement.

## Mrs K (PO-9785)

### Recovery of pension overpayment restricted by limitation and change of position defence

In **Mrs K**, TPO held that the decision to recover an overpayment of personal injury benefit, paid by the pensioners' scheme, was unfair.

TPO found that the Limitation Act 1980 restricted the amount that could be recovered to overpayments arising after 2010. The **Webber** case on the six-year limitation period for claiming overpayments was explicitly followed. Moreover, Mrs K had a valid partial change of position defence which restricted recovery further: TPO noted, following an earlier case, that a change of position defence is not limited to cases where funds have been spent on specific identifiable items of expenditure, and that it is right for the courts not to apply "too demanding a standard of proof when an honest defendant says he has spent an overpayment on improving his lifestyle but cannot produce detailed accounting".

The decision is a reminder of the approach that TPO will generally adopt in relation to overpayment recovery and change of position defences.

## Mr R (PO-18103)

### Suspension of pension after no response from member was not maladministration

TPO has rejected a **complaint** from a member whose pension was suspended when they did not respond to the scheme's annual 'Certificate of Existence' exercise.

TPO confirmed that there had been no maladministration: it was appropriate for such an exercise to be undertaken in accordance with trustees' fiduciary duties, exercises of this type are encouraged by TPR, and a standard process had been followed.

Although the postal service was "volatile" in Mr R's country of residence, Mr R had not requested contact by other means and so it was not reasonable for him to expect that other means should be used. Further, Mr R had suffered no financial loss, as his pension had been reinstated and the arrears paid.

## Contact

Sackers' market leading Pensions & Investment Litigation team is consistently ranked in the top tier by both Chambers UK and the Legal 500. Sackers is experienced in handling cases before the Pensions Regulator, High Court and Pensions Ombudsman, with Chambers UK 2019 commenting that "They are exceptional. Their knowledge in pensions is second to none and I always get a response in a clear and concise manner."

Sackers is the UK's leading commercial law firm for pension scheme trustees, employers and providers. Over 50 lawyers focus on pensions and its related areas. For more information on any of the articles in this briefing, please get in touch with Peter or any of the team below, or your usual Sackers' contact.



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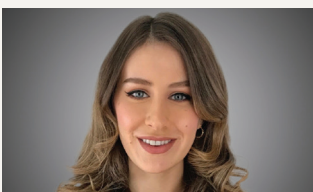
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