Sackers

Arrears and limitation – a follow-up to Lloyds

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Introduction

On 18 June 2021, the High Court handed down its judgment in the Axminster Carpets case. With Mr Justice Morgan once again at the helm, the case helps clarify the arrears and limitations aspects of *Lloyds No.1*.

Key points

- Whilst legislation allows benefits which remain unclaimed for six years to be forfeited, the drafting of scheme rules needs to be checked carefully.
- Where scheme rules provide trustees with a discretion not to forfeit benefits, factors to bear in mind when considering whether or not to exercise that discretion include both the lack of awareness about a particular benefit and the absence of fault on the part of the beneficiary.
- Like *Lloyds No.1*, the case confirms that no limitation period generally applies to beneficiaries seeking to recover arrears.

Background

On its appointment to the Axminster Carpets Group Retirement Benefits Plan ("the Scheme") in 2013, Punter Southall Governance Services Ltd ("the Trustee") identified some legal uncertainties in the Scheme's documentation. It sought directions from the Court to resolve these, with a representative beneficiary supporting members' interests. With the Scheme currently in a PPF assessment period, the Trustee and representative beneficiary agreed various compromises.

Pension increases had historically been underpaid and questions arose as to whether any arrears were forfeit under the scheme rules or time barred under section 21(1)(b) of the Limitation Act 1980. Similar points had been touched upon in the *Lloyds No.1* judgment in the context of GMP equalisation.

What type of rule is it?

In *Lloyds No.1*, Mr Justice Morgan concluded that the rules in that case meant that a beneficiary was only entitled to claim arrears of payments for the period of six years before their claim. This is consistent with pensions legislation, which permits the forfeiture of unclaimed benefits after six years. In addition, such arrears “should bear simple interest at 1% over base rate”.

The Scheme’s two provisions

Mr Justice Morgan looked at two different provisions under the Scheme documentation:

- Clause 25 – which enabled the Trustee to apply any monies payable but not claimed within six years in various ways at their discretion. Rather than dealing with the forfeiture of unclaimed benefits, Clause 25 was likely designed to address orphaned money, for example, where a beneficiary was missing

- Rule 36 – in contrast specifically referred to a beneficiary failing to claim a benefit and would therefore operate to forfeit unpaid pensions and instalments of pensions.

The upshot is that the drafting of scheme rules needs to be checked carefully.

What if the trustees have discretion to pay beyond six years?

Where benefits have fallen due and either not been paid or not paid in full for a period of six years, and the beneficiary has not made a claim, “then the beneficiary’s right to that payment is automatically forfeited”. This is consistent with the judgment in Lloyds No.1, ie that a claim for arrears needs to be specific, asking for a pension to be put into payment is not enough.

However, where trustees have discretion to pay arrears beyond the six-year period, it is “obviously relevant to the exercise” of that discretion “to consider how the situation has arisen and the consequences of the discretion being exercised or not”. As the Scheme rules included such a discretion, the judge made clear that “the absence of fault on the part of beneficiaries and/or the presence of fault on the part of the trustees are capable of being relevant factors”.

In addition, whilst not required by Rule 36, “the first reaction of the Trustee should be to make good the earlier underpayments without further delay”. However, other factors might come into play when considering the exercise of a discretion not to forfeit, such as administrative difficulties. It was also open to the Trustee to decide that only a proportion of arrears should be forfeit.

Was the introduction of Rule 36 valid?

Subject to certain exceptions, the Scheme’s amendment power contained a restriction preventing an amendment or addition being made which would “diminish” accrued benefits. (A certificate under section 67 of the Pensions Act 1995, protection of subsisting rights, confirmed that the changes complied with the legislation.)

Rule 36 applied to payments falling due after 16 March 2001 in respect of *all* pensionable service of active members at that date. But the judge decided that the amount of the benefits to which the beneficiary is entitled is unaffected and not "diminished" by its introduction. Rule 36 would only permit the forfeiture of benefits where a beneficiary failed to make a claim. As this *might* happen but it cannot be said that it “would” happen, the judge decided that its introduction was not problematic.

In terms of whether the judgment here has broader application, the drafting of any proviso to an amendment power will need to be assessed on a case by case basis. For example, the judge’s conclusion would have been different if the proviso had referred to a change which “might diminish” as opposed to “would diminish” accrued benefits.

Might the timeframe for bringing a claim be limited?

Lloyds No.1 made clear that, by virtue of section 21(1)(b) of the Limitation Act 1980, no limitation period applies to beneficiaries seeking to recover arrears. This latest judgment confirms that position, holding that a member claim for arrears against current trustees is not time-barred.

However, Mr Justice Morgan makes “tentative comments” as to the ability of a beneficiary to claim compensation for breaches of trust against former trustees. As they are no longer in possession of the trust property, former trustees should be able to rely on the usual six-year limitation period. This chimes with current thinking that claims following a scheme’s winding up, for example, should be time-limited in this way.

When is interest payable?

In *Lloyds No. 1*, the parties had agreed that interest was payable on the arrears of benefits, on the basis that an award of interest was required when assessing compensation in equal treatment cases.

Technical arguments were made as to whether or not interest fell to be paid on the pension increase arrears. Although the Courts have a statutory power to award interest, a claim against current trustees for monies owed would not, of itself, include a claim for interest. However, a claim for compensation following a breach of trust could include interest. The Court was not asked to decide whether it would award interest. Mr Justice Morgan only stated that he was “not convinced” that members would be entitled to interest on the full amount of arrears for the full period since they fell due.

A claim for interest against former trustees would have to be specific and, for the same reasons as outlined above, would be subject to the six-year limitation period.

Comment

As ever, the precise wording of the rules will be key to assessing just how relevant the issues discussed in the Axminster case are to any particular scheme. This latest judgment largely confirms what was already known following *Lloyds No.1*, but also fleshes out some essential details in relation to both limitation and forfeiture.

If you have any questions on any of the above, please speak to your usual Sackers contact.

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