SPEEDREAD

Rectification of successive deeds: actual mistake in scheme rules
The High Court has held that a mistake on the application of an actuarial reduction policy in a scheme's rules was sufficiently evidenced to be an actual mistake and so the original scheme document and two subsequent scheme documents should be rectified.

Pensions Protection Fund: 2021/22 levy
The Pensions Protection Fund is consulting on its draft 2020/21 levy rules, which affect defined benefit schemes.

Pensions Ombudsman: loss of investment opportunity
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Rectification of successive deeds: mistake in scheme rules

Summary. The High Court has held that a mistake on the application of an actuarial reduction policy in a scheme's rules was sufficiently evidenced to be an actual mistake and so the original scheme document and two subsequent scheme documents should be rectified.

Background. A mistake will be rectified by the courts if both:

- It is proven that, as a result of the mistake, the document containing it fails to accurately reflect the original intentions of the parties.
- It is not possible to correct the mistake by another method.

The effect of rectification is for the written document to be amended retrospectively to the extent that it reflects the terms originally intended by the parties to put the parties in the position they would have been in if the mistake had not been made.

Facts. An employer, S, identified a mistake in its pension scheme trust deed and rules which, unusually, provided an uplift to deferred members who took early retirement but did not apply the uplift to those in active employment who took early retirement. The mistake related to the early retirement policy for transferred members of a previous scheme. The mistake was originally made in 1998 and, despite two further amendments to the documents in 1999 and 2003, it went unnoticed for over 20 years.

S undertook an extensive investigation into how the mistaken rules came about with a view to making it clear to the court that the 1998 deed contained an error. S then applied to the court for summary judgment, seeking the equitable remedy of mistake on identifying an error.

Decision. The court granted the order for rectification.

The scheme had been administered, regardless of the mistake, on the basis that the actuarial reduction applied to transferred members who took early retirement from deferment. This continuation of conduct after the date of the document was powerful evidence that the error had not disturbed the status quo from the first occasion when the error was said to have occurred.

Importantly, and unusually, the power to amend the rules was a unilateral power and so only S could approve any amendments. No evidence was available to show that the mistaken intention had been discussed in any way. It may be the case, in a pensions context, that it will be permissible to allow rectification when it can be clearly implied that the parties did not intend to effect a particular change.

For unilateral powers to be rectified, in the same way as for bilateral transactions, there is a need for the party who made the decision, in this case, S, to provide convincing proof of its intention on the balance of probabilities. On the facts here, S's intention was not in dispute: trustee approval had been obtained for each version of the documents being amended and each of the documents was executed on behalf of S and the trustees.

Comment. This decision should be considered as having been decided on its facts. However, it will have wider applications, for example, when dealing with unilateral trustee amendment powers. Disputes are likely to arise where there is a difference of intention between a principal employer and the trustees.

Case: SPS Technologies Ltd v Moitt and others [2020] EWHC 2421 (Ch).

Pensions Protection Fund: 2021/22 levy

Summary. The Pensions Protection Fund (PPF) is consulting on its draft 2020/21 levy rules, which affect defined benefit (DB) schemes (the consultation).

Background. The PPF pays compensation to members of DB pension schemes if their sponsoring employer suffers a qualifying insolvency event and certain prescribed criteria apply. The PPF is funded in part by an annual levy on DB pension schemes.

Usually, the PPF would consult on its levy rules for the next three years, but this has changed to an annual determination in light of the 2019 novel coronavirus disease (COVID-19) pandemic. The PPF expects to resume the three-yearly determinations from 2023/24.

Facts. The PPF has stated that, despite the increased risk posed by the outbreak of COVID-19, it has avoided increasing the levy. The PPF has highlighted two proposed changes:

- The levy for schemes with less than £20 million in liabilities will be halved to better reflect their risk to the PPF. The reduction will be tapered so that only schemes with £50 million or more in liabilities will be charged in full. This equates to an estimated reduction in the levy by around £100 million.

- The cap on the amount of levy paid by any individual scheme will be cut from 0.5% of that scheme's liabilities to 0.25%.

The PPF expects to issue its response, and the final determination, by the end of January 2021.

Comment. Trustees and employers may wish to consider responding to the consultation.

Source: PPF: Changes to levy methodology for the 2021/22 levy year, 29 September 2020, www.ppf.co.uk/sites/default/files/2020-09/Consultation_doc_September_2020_1.pdf. Comments are requested by 24 November 2020.

Pensions Ombudsman: loss of investment opportunity

Summary. The Pensions Ombudsman (the Ombudsman) has held that, due to unreasonable delays and maladministration, a member of a pension scheme had lost the opportunity to make a financial profit and was owed compensation for this loss.

The facts. T was a member of a small, self-administered pension scheme. J was the administrator. T held cash and stocks with B, and £220,000 in cash with J. Following notification that B would be closing its pension trader accounts on 30 June 2016, T emailed J to start the process of transferring his cash and stocks out to enable him to invest in other ways in anticipation of the Brexit referendum, and the UK stock market decreasing in value as a result. T insisted that the transfer must be done before 30 June 2016 otherwise B would unilaterally liquidate to cash.

The £250,000 cash was transferred by 19 August 2016, and the stock was transferred by 3 October 2016. T complained that J had caused undue and avoidable delays in the transfer, which caused him financial loss.

J argued that it had carried out its duties in a satisfactory manner and within acceptable timescales. J argued that the first time T had mentioned the referendum vote was on 23 June 2016, the actual date of the vote, and that if T wanted to speculate on the outcome of the vote in the stock market, he was free to do so with the trading facility it offered, which T had been known to use previously. However, J did accept that there were two instances of maladministration on its part: a delayed response to an email from T; and not being aware of T's intention to make a partial transfer earlier. J offered T £100 compensation.

The Ombudsman held that there had been maladministration by J but that the tests for establishing financial loss were not satisfied. However, it noted that significant distress and inconvenience had been caused to T and instructed J to pay him £2,000. T appealed.

The High Court allowed the appeal. It held that there was no difficulty in establishing reasonable foreseeability for the purposes of loss as a request for a transfer out is for the purpose, or the possible purpose, of investment and, if there is a delay, the investor will, or may, lose the opportunity to invest over that period. Therefore, the Ombudsman had been wrong to conclude that T's loss was not measurable. The Ombudsman should have considered the position if the transfer had been made on a non-negligent date. The High Court remitted the determination back to the Ombudsman.

Decision. The Ombudsman held that J was required to make good T's loss, with interest, as it was caused by J's maladministration. It awarded T £43,700 in compensation.

The transfer should have occurred by 23 June 2016, the Brexit referendum date, at the latest, in light of the correspondence between the parties earlier in June 2016. T had satisfied the requisite tests in respect of loss and if his transfer had been made when he wanted, T would have received a profit of about £43,700.

Comment. Although this could be an alarming decision for pension schemes and administrators, it is important to remember that the principles of law applied have long been established but it is rare for it to be possible to apply them in this way. This decision involved a unique set of facts because of Brexit, as well as lengthy delays by J.

Case: Determination by the Pensions Ombudsman on a complaint by Mr T (CAS-38354-V5L8).