

Pensions Dispute Resolution Practice

Disputes Agenda

SUMMER | 2025



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Welcome to Disputes Agenda, the new biannual publication from the Linklaters Pensions Dispute Resolution team.

This publication comments on key recent pensions cases that have come before the courts, as well as important determinations of the Pensions Ombudsman. We also take a look at recent and ongoing action by the Pensions Regulator.

In this edition, we feature the important case of Verity Trustees Ltd v Wood, which raised a number of questions relating to Section 37 confirmations, as well as a host of other issues of general importance to the pensions industry. Judgment is expected later this year. We also cover the Arcadia case about the merger of two schemes to allow one of the schemes to benefit from the surplus in the other. We then take a dive into some recent regulatory action, before covering a trio of noteworthy Pensions Ombudsman determinations.

We hope you will find Disputes Agenda informative and useful. Please do not hesitate to get in touch if you would like to discuss any of the issues mentioned in the publication, or indeed any contentious issues on which the Linklaters Pensions Dispute Resolution team may be able to assist.



Mark Blyth



Verity Trustees Ltd v Wood

During February and March of this year, the case of *Verity Trustees Ltd v Wood* was heard in the High Court. This is believed to be the longest pensions case ever dealing solely with questions of law, and was heard over 32 days. This case considered a number of significant issues which will have implications for many other schemes in the industry. Judgment is not expected until the autumn, but we have summarised some of the key questions under consideration below. Linklaters acted for Verity Trustees (the Trustee) in this case.

Section 37

The case raised a number of questions relating to Section 37 confirmations, following the Court of Appeal decision in *Virgin Media* last year (see our [client alert](#) for further details). This includes the scope of the amendments requiring a Section 37 confirmation. The Trustee argued that this was limited to amendments relating to the matters listed in the reference scheme test, and the representative beneficiary arguing that it was any amendments concerning pension rights, including lump sums that were linked to pension rights. Given the difference between these two positions, the answer to this question could have a significant impact on schemes grappling with the issues arising from *Virgin Media*.

Another important question raised is whether closure to accrual needs a Section 37 confirmation, with the Trustee arguing it did not, or alternatively that the contracting-out certificate just had to be surrendered. The representative beneficiary's case was that closure would only be valid on surrender of the contracting-out certificate, and that this could only be done in advance of closure (the Trustee argued it could be done retrospectively afterwards).

There were also questions on:

- > whether an amendment which did not have a Section 37 confirmation could be valid from the next "triennial reassurance statement" provided by the scheme actuary;
- > whether an amendment which did not have a Section 37 confirmation could be valid from a subsequent deed which did, if the prior amendment was referred to in the recitals;
- > where a deed makes a number of changes, some of which would require a Section 37 confirmation and some of which would not, whether those which do not require a Section 37 confirmation are automatically valid in circumstances where a confirmation was not provided and the other changes are invalid; and
- > whether the exercise of a power which could not be used to prevent the scheme from satisfying the reference scheme test required Section 37 confirmations.

Amendment power restrictions

The case considers a restriction in the amendment power preventing detrimental changes to the “rights” of people in receipt of a pension or otherwise interested in the assets of the scheme. The *Wedgwood* case previously decided that a restriction relating to “rights” only protected benefits earned up to the date of the change. This will now be considered following both the BBC decision, which said that a restriction referring to “interests” protected future service benefits, and the *Virgin Media* decision, which looked at the meaning of “rights” in the context of statutory contracting-out provisions.

Pension increases and revaluation

There were a number of questions relating to pension increases and revaluation. Some of these are very specific to the wording of the rules in the Pensions Trust. However, one issue of wider interest will be whether proportionate pension increases apply in the first year after retirement even where there is no express provision on pro rating.

Severance

Another question of wider relevance is how severance can apply, in order to save the “good” from the “bad” where a change would be partially invalid. This can be relevant where, for example, an amendment is made retrospectively and would be invalid for benefits already earned but valid for future service. The case considers what test should be applied in these circumstances, and in particular whether it is necessary to show the parties to the change would still have made it if they had known of its more limited effect.



Sarah Opie

Arcadia Group Pension Trust Ltd v Smith

Background

The High Court has approved a decision by the trustee of the Arcadia Group Pension Scheme (the Staff Scheme) to amend the Staff Scheme rules to allow it to accept a transfer-in of all the assets and liabilities of the Arcadia Group Senior Executives Pension Scheme (the Executive Scheme). The schemes had different trustees, but the same principal employer, Arcadia Group Limited, and had been administered together. Both schemes were in wind up following the administration and then liquidation of Arcadia.

Due to the unforeseen market volatility following the 2022 mini-Budget, whilst the Staff Scheme had a funding surplus, the Executive Scheme had a funding deficit. The practical effect of the proposed amendment was that the schemes would merge, and the Staff Scheme's surplus could be applied to meet the deficit in the Executive Scheme. In this case, the High Court confirmed that the proposed amendment fell within the scope of the trustee's amendment power and was made for a proper purpose.

Key points of interest

The decision raises a number of important points that may be of interest to scheme trustees and employers:

- > *No implied restriction on a widely-drafted amendment power, even in the context of a winding-up:* The existing Staff Scheme rules contained a prohibition on bulk transfers-in. The amendment at issue would reverse that position. The Staff Scheme's amendment power was broad and flexible, and the rules expressly provided that: (a) the power would continue until the Staff Scheme had been wound-up; and (b) if the principal employer was in liquidation (as here) the power would vest solely in the trustee. The Court found no implied restriction on the trustee amending the Staff Scheme rules to permit bulk transfers-in, even in the context of the Staff Scheme's winding-up and Arcadia's liquidation. Though the existence of implied restrictions will be sensitive to the specific rules of a scheme, other scheme trustees who have broad, unrestricted amendment powers and are facing their schemes winding-up, may be able to draw some comfort from the Court's permissive approach to the exercise of the amendment power in this case.

- > *Trustee's proper purpose was not confined to existing members' interests:* The Court accepted that the amendment would result in Executive Scheme members being added to the Staff Scheme. This would dilute the potential interest of the existing Staff Scheme members in the funding surplus. Nevertheless, the Court decided that the decision to amend the rules was taken for a proper purpose, as the interests of the existing members “do not have to be considered exclusively”. Other important considerations included: the Staff Scheme's objects (see below); the close relationship between the schemes; and the extrinsic market-led source of both the surplus and the deficit.
- > *Importance of a scheme's stated objects:* The Staff Scheme's main objects were to provide its members the pension benefits to which they were entitled. Though the trustee had discretion to use a funding surplus to increase member benefits, the members had no entitlement to such an increase. The Court concluded, therefore, that the existing members were not being deprived of an entitlement; the merger would only dilute their “contingent interest” in an increase in their benefits.
- > *The value of the Court approving significant or controversial trustee decisions:* Having taken the amendment and merger decisions in principle, the trustee applied to the Court to bless those decisions. When a trustee decision is momentous and significant liabilities are at stake, seeking judicial confirmation can be an effective method of mitigating the risks of a future potential challenge to the decision.

It is important to note that, in this case, the Court emphasised the particularly close links between the two schemes, and the relatively unusual factual matrix. Therefore, while it is potentially helpful in showing that mergers of schemes with very different funding positions is possible, it remains to be seen how widely the approach taken in this case can and will be adopted in other cases.



**Kate
Kerr-Davis**



Regulator resolves dispute over MGN Pension Scheme's 2019 valuation

The Pensions Regulator has successfully intervened in a dispute over the 2019 triennial valuation of the MGN Pension Scheme, providing a positive resolution for the scheme's members after a prolonged failure to agree between the statutory employer, MGN Ltd (part of Reach Plc), and scheme trustees.

Background

The MGN Pension Scheme has nearly 5,500 members, including over 3,000 pensioners and, as at the previously agreed 2016 triennial valuation, had £842m in assets.

The 2019 valuation for the MGN Pension Scheme became contentious when negotiations between Reach Plc and the trustees stalled, with no agreement by the statutory 15-month deadline. This failure to agree extended into the next valuation cycle, complicating matters further.

In August 2022, with no resolution in sight, the case was escalated and formal notification of a failure to agree was submitted to the Regulator.

Regulatory action

The Regulator sought to break the deadlock by encouraging constructive dialogue between the parties, rather than moving immediately to exercise of enforcement powers – such as the ability to determine the valuation and impose a schedule of contributions. The Regulator stressed to the

parties, however, that if an agreement could not be achieved, then it would proceed with formal enforcement action.

Intervention in this case included engagement and clear guidance about possible regulatory consequences, though ultimately the Regulator did not resort to exercising its powers.

Outcome

The Regulator's efforts facilitated an agreement on both the 2019 and 2022 valuations. Key outcomes included:

- > an enhanced recovery plan which provided annual deficit recovery contributions of £46m, up from £41m under the previous plan;
- > an additional £5.1m per year contributed to the scheme from the start of 2023, backdated and continuing until the end of January 2028 i.e. an additional £25.5m in support for the scheme over the period; and
- > amendments to the existing dividend-sharing agreement, ensuring extra contributions would be made to the scheme if future Reach Plc dividend increases exceed a set threshold.

The Regulator expects these measures to result in the scheme being fully funded on a prudent basis by January 2028, significantly improving member security while balancing the sustainable growth of the employer.

Significance

The case underscores the importance of meeting regulatory deadlines for valuations, as well as maintaining open dialogue between trustees and employers. It also showcases the Regulator's pragmatic approach to late valuations where possible, combining negotiation and potential enforcement to achieve the best outcomes for members.

This resolution highlights how proactive engagement by the Regulator can strengthen pension schemes and provide long-term financial security for members.



**Joe
Chambers**



Regulator successful in defending Tribunal challenge from Buildings UK Midlands Ltd

Judgment has been handed down in a First Tier Tribunal appeal against fixed and escalating penalty notices issued by the Regulator against an employer for failure to comply with its auto-enrolment duties.

Background

Buildings UK Midlands Ltd was found by the Regulator to have failed in its statutory duties to enrol all eligible jobholders into an occupational or workplace personal pension scheme. In light of this failure, the Regulator issued correspondence to a director of the employer in January, March and May 2024, advising the employer of its auto-enrolment duties and noting that penalty action would follow if duties were not complied with.

A Compliance Notice was issued by the Regulator on 18 June, requiring that a declaration of compliance be issued by 29 July 2023. The Regulator also attempted to call the employer on 1 July 2024, although the person who answered was recorded as having hung up the phone.

Following the failure of the employer to engage with the Regulator, and in the absence of a declaration of compliance, the Regulator issued a £400 fixed penalty notice on 14 August 2024 and an escalating penalty notice (of a £500 daily rate to accrue from 11 October if the Compliance Notice requirements were not met) on 13 September 2024.

The employer then submitted its declaration of compliance on 26 September 2024 and filed an appeal with the Tribunal on 11 December 2024.

Evidence and arguments

The employer argued that it did not receive the correspondence from the Regulator, including the two penalty notices, in a fair and timely manner. The employer claimed that, due to a typing error, another company was named in the body of the letter. It also submitted that the employer was based next to a traveller site and that post regularly went missing.

In response, the Regulator argued that the grounds set out by the employer did not amount to a reasonable excuse for failure to comply with the notices that had been served and that presumption of service of the statutory notices had not been successfully overturned by the employer in its submissions. The Regulator also noted that, while it issues reminders, it is not the Regulator's duty to make employers aware of their statutory duties, nor to ensure compliance.

The Tribunal's decision

The Tribunal found in favour of the Regulator and upheld the penalty notices. In particular, the judge found that whilst the employer had asserted issues with receiving post, there was no clarity as to why the traveller site was relevant and no evidence as to what the difficulties were. Further to this, the judge noted that the employer had at no point stated what was received, and when. The director of the employer also never stated that the notices failed to be delivered at all.

On this basis, the judge found that the penalty notices had been properly served on the employer, and that the employer had not provided any evidence to sustain the argument that there had been a reasonable excuse for non-compliance. The judge agreed with the Regulator in commenting that *"it is incumbent on employers to ensure that businesses are compliant in this area, regardless of any reminders received or not received from the Regulator"*.



**Joe
Chambers**



Box Clever settlement

Following over a decade of regulatory proceedings, ITV and the Pensions Regulator have entered into a settlement under which Box Clever pension scheme members' benefits will be secured in full under the ITV Pension Scheme.

Background

Box Clever was a joint venture formed in 2001 between the television rental businesses of Granada (now part of ITV) and Thorn (now Carmelite). Employees were transferred to the Box Clever company from both Granada and Thorn, and those employees were enrolled in the newly established Box Clever Group Pension Scheme (the BC Scheme).

The Box Clever business collapsed in 2011. Soon after, the Regulator, exercising its anti-avoidance powers, opened an investigation into five ITV companies. The Regulator alleged that ITV had extracted significant value from the joint venture. The BC Scheme has been in a Pension Protection Fund assessment period since 2014, with members' benefits capped at PPF levels.

Following a number of legal challenges in the courts, the Regulator issued financial support directions (FSDs) to those ITV companies in 2020. The FSDs required ITV to provide reasonable financial support to the BC Scheme.

An agreement could not be reached regarding this financial support and so the Regulator issued a warning notice in 2022 seeking a contribution notice for the full buy-out deficit of the BC Scheme (estimated at that time to be approximately £76m). This was the first time the Regulator had sought to exercise its power to issue a contribution notice for failure to comply with an FSD.

Settlement

In July 2024, the Regulator and ITV reached agreement in principle to settle the Regulator's investigation. Under the terms of the agreement:

- > all of the 2,800 members of the BC Scheme (both former Granada and former Thorn members) will be transferred to the ITV Pension Scheme and will receive their full BC Scheme benefits;
- > certain members will receive a backpayments representing the difference between their BC Scheme benefits and their pension paid while in the PPF; and
- > the Regulator will cease its regulatory action against ITV.

The agreement was also supported by the trustees of the BC Scheme and the PPF.

Subject to certain conditions being fulfilled, including the trustee of the ITV Pension Scheme consenting to the transfer, it is anticipated that the transfer will take place later in 2025.

Comments

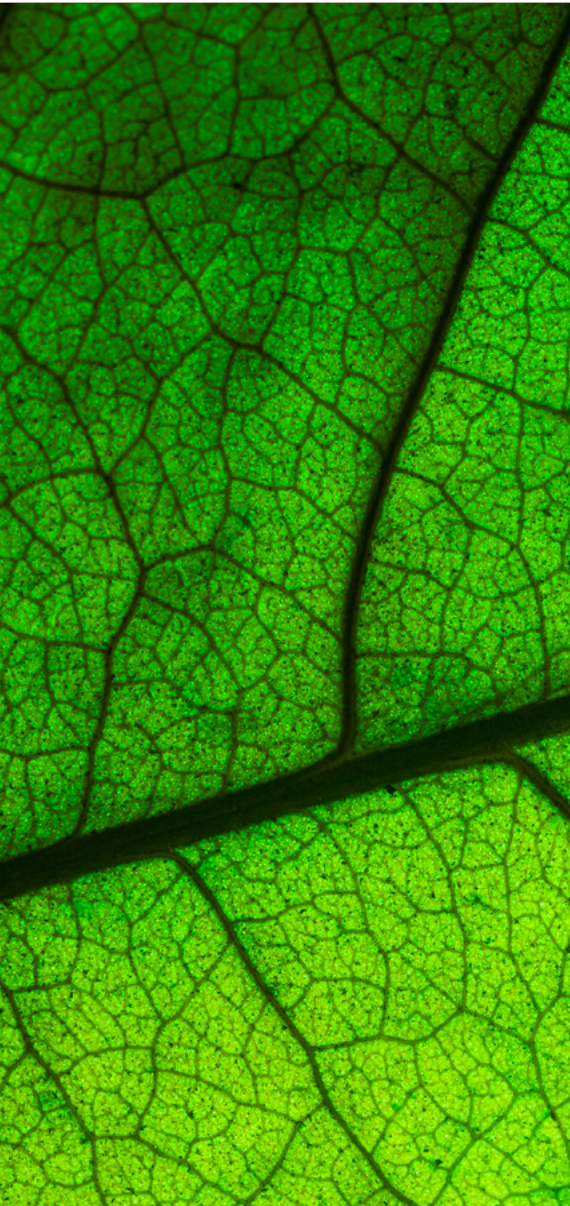
The settlement between the Regulator and ITV brings an end to these long running regulatory proceedings, which involved a number of challenges in the Upper Tribunal and the Court of Appeal by ITV.

The settlement represents a positive outcome for members, whose benefits otherwise would have continued to be capped at PPF levels, and who will benefit from ITV's support of the ITV Pension Scheme going forward.

Linklaters have acted as legal advisers to ITV in relation to these regulatory proceedings since 2022.



**Chris
Biddle**



Mr H v Olivetti UK Limited Pension and Life Assurance Scheme

The Pensions Ombudsman has upheld a complaint against a trustee and employer for not honouring a promise of pension increases made to a member 18 years ago.

Background

Mr H was a member of the Olivetti UK Limited Pension and Life Assurance Scheme (the New Scheme), having transferred in from the Olsy Pension Scheme (the Previous Scheme).

Whilst a member of the Previous Scheme, Mr H became entitled to "special terms" benefits which were more generous than the standard benefits offered to Previous Scheme members. The special terms were contained within the Previous Scheme's rules but did not explicitly refer to the increases to be granted to pensions in payment. Instead, these were in a Special Member Supplement.

Mr H's employment was transferred to Olivetti UK Limited (the Employer) as part of an internal re-organisation of Olivetti and later transferred to the New Scheme with effect from 1 January 1998. As the only Previous Scheme member entitled to special terms, Mr H received an individual memorandum explaining the benefit structure that would apply to him in the New Scheme. The memorandum noted that it should be read in conjunction with the Special Member Supplement and that his benefits

would "mirror" those under the Previous Scheme. A later communication between Mr H and the benefit and actuarial consultants of the New Scheme also confirmed that his accrued and future pensionable service benefits would mirror those under the Previous Scheme. However, these promised mirrored benefits were never properly documented.

With effect from 10 June 1998, Mr H resigned from the Employer. The leaving service statement he received set out benefits consistent with him having been admitted to membership of the New Scheme on terms mirroring his membership of the Previous Scheme. Mr H opted to take his benefits in 2014.

It was later identified that the New Scheme's rules had never been validly amended in respect of increases to pensions in payment. Consequently, in 2017, it was announced to members that they were only entitled to statutory increases. Mr H complained that, irrespective of what the New Scheme's rules said about increases, he was entitled to the increases set out in the Special Member Supplement by reason of:

- > his benefit entitlement under the Previous Scheme; and
- > the promise made at the time he transferred into the New Scheme that he would receive mirror benefits.

Ombudsman's determination

The Ombudsman found that there was an enforceable contract between the Employer and Mr H to provide mirror benefits, despite the fact that the promise made to Mr H was never documented.

The New Scheme had a unilateral power of amendment allowing the Employer to make changes by resolution without trustee consent. This meant that it was still possible for the Employer to give effect to the contractual promise without trustee agreement, and to do so with retrospective effect.

The Ombudsman held that there was a breach of:

- > the continuing contractual obligation to provide mirror benefits;
- > an implied term that neither party would do anything to frustrate the performance of the contract by failing to document (or otherwise provide by way of augmentation) the promised benefits; and
- > the implied duty of good faith by failing to take steps to make those changes on discovering the failure to document.

The Employer's limitation defence also failed because the contractual obligation continued after the contract was terminated on 10 June 1998. Even if the breach had occurred more than six years before the date of Mr H's

complaint, the claim would not have been time barred because the Limitation Act's six year contractual limitation period only applies to claims for damages and not to claims for specific performance.

In relation to the trustee, the Ombudsman held that it did not matter that Mr H's benefits had not been properly documented in the rules. There was evidence that the benefits had been granted by exercise of the transfer in power under the rules, which allowed the trustee to grant benefits in a different form. The trustee was therefore found to be in breach of trust for failing to administer the New Scheme in accordance with the transfer in power.

Comments

This determination serves as an important reminder to properly document promises made, particularly on transfers in and scheme mergers. Care is also needed in any communications with members, as these could potentially give rise to continuing contractual obligations.



**Joshua
Pusey**



Mr S v Smiths Group plc and S I Pensions Trustees Limited

Mr S complained that the increase applied to his scheme pension was not made in accordance with a commitment made to members in 1998.

Background

Mr S joined the Smiths Industries Pension Scheme in 1980. In 1998, the trustee sent scheme members a newsletter confirming the aim was to provide annual increases in line with the Retail Prices Index, up to a maximum of 10% a year, subject to the finances of the scheme (the Stated Aim).

In 1999, the scheme rules were amended. Under Rule 7.1 of the amended rules, annual increases to pensions in payment in excess of members' Guaranteed Minimum Pension were capped at the lower of 5% and the increase in RPI. However, where RPI exceeded 5%, Rule 7.1 allowed the trustee to increase the cap to 10% if requested by the employer and provided both the trustee and employer had regard to the Stated Aim and the finances of the scheme.

Mr S subsequently took early retirement in October 2001. In 2022 and 2023, annual increases to Mr S's GMP excess were capped at 5%, despite RPI exceeding 5% in both years. In neither year did the employer ask the trustee to raise the pension increase cap.

Mr S's complaint was that he should have received higher increases on his GMP excess, as Rule 7.1 did not reflect the commitment made to members under the

1998 newsletter. He argued the commitment under the newsletter was to provide annual increases aligned with RPI (up to 10%) based solely on scheme finances, rather than requiring a request by the employer. As such, Mr S complained that the trustee and the employer had failed to deliver the benefits promised to members in the 1998 newsletter. In doing so, he argued the employer was in breach of the duty of good faith owed by an employer.

Ombudsman's determination

The Ombudsman found:

- > the 1998 newsletter did not provide an absolute commitment to pay the higher rate of increases where RPI exceeded 5% as it clearly stated an aim, not a guarantee, of providing increases of up to 10% a year;
- > both the trustee and the employer acted in accordance with the rules. The employer gave proper consideration to the Stated Aim when deciding not to request the trustee provide members with higher increases, having both considered the funding position of the scheme and taken professional advice on its decision. As the employer did not request the trustee raise the relevant cap, the trustee had no power under the rules to do so unilaterally; and
- > the employer's decision to not request the trustee provide higher increases was made in the correct manner and did not breach its duty of good faith.

The Ombudsman re-iterated it is not its role to make its own decision as to the exercise of a discretion and that it will not intervene just because it considers a decision-maker could have made a different decision. Instead, it will consider whether a discretion has been exercised in the right manner. In this case, as the employer was not exercising a fiduciary power, the correct test is that set out in *IBM United Kingdom Holdings Ltd & Anor v Dalgleish & Ors*, namely:

- > was the discretionary decision exercised for a proper purpose;
- > was the decision reached in a rational manner taking into account all relevant factors (and no irrelevant factors); and
- > was it a decision that could have been reached by a reasonable decision maker in the position the employer was in when it made it.

The Ombudsman found that the employer had complied with each limb of this test.

Comments

This determination shows the importance of implementing a robust decision-making process when exercising discretions under the scheme rules. It highlights that it is good practice for trustees and employers to keep records of the basis on which any discretion is exercised (or not, as the case may be).



**Oliver
Hill**



Mr S v Rowanmoor Group plc and Rowanmoor Trustees Limited

Mr S brought a complaint against Rowanmoor Group plc, as the administrator, and Rowanmoor Trustees Limited (RTL), as the trustee, of The Mr S Limited Executive Pension Scheme. The complaint revolved around the trustee's duties relating to an investment in the German Property Group (GPG), which resulted in substantial financial loss for Mr S.

Background

Mr S was guided by an unregulated introducer to invest in GPG through a Small Self-Administered Scheme (SSAS), managed by Rowanmoor. A SSAS is a type of occupational pension scheme where each member is typically responsible for investment decisions alongside appointed trustees.

In Mr S's case, he was the sole scheme member and was the member trustee alongside RTL, which was acting as a professional co-trustee.

The proposed investment in GPG was high-risk and largely unsuitable for Mr S, considering that GPG was classified as an unregulated collective investment scheme, known for its speculative nature. Despite warnings from Rowanmoor, Mr S proceeded with the investment.

Ombudsman's determination

The Ombudsman found that Rowanmoor's role as administrator did not include vetting the appropriateness of investment choices.

However, the Ombudsman found that RTL did not adequately evaluate the investment's suitability as part of its trustee responsibilities. A professional trustee must consider economic circumstances, diversification, and factual knowledge at the time of the investment. RTL permitted most of Mr S's pension assets to be allocated to the GPG investment, contrary to its duty of care to protect the member's financial interests. The Ombudsman found that RTL fell below the standard expected of a professional trustee, breaching its duty of care and exposing the scheme and Mr S to undue financial risk.

The Ombudsman also found that the exoneration and indemnity provisions in respect of the trustees were not effective as a result of Section 33 of the Pensions Act 1995, which provides that liability for breach of a trustee's obligation to take care or exercise skill in the performance of any investment functions cannot be excluded or restricted.

The Ombudsman apportioned 80% of the responsibility for Mr S's financial loss to RTL and 20% to Mr S. This reflects RTL's failure to assess the investment's suitability or engage effectively with Mr S. Clause 8 of the Trust Deed and Rules required unanimous decisions at trustee meetings and RTL, as a professional trustee, could have used its judgement to prevent the investment. As a co-trustee, Mr S agreed to the investment decisions but lacked the necessary insight to assess their suitability properly.

The Ombudsman directed RTL to compensate by covering 80% of the loss to bring Mr S's scheme back to its previous notional value, excluding the impact of the GPG investment and considering ongoing liabilities. Additionally, RTL was ordered to address any further costs or liabilities resulting from the investment and pay £1,000 to Mr S for the distress and inconvenience he suffered.

Comments

This determination highlights the importance of thorough due diligence and active engagement by trustees to ensure investments are suitable. It also reiterates that liability for breach of investment duties cannot be excluded or restricted. In practice, most trustees delegate investment decisions to authorised fund managers and will not generally be liable for the acts or defaults of those fund managers. However, trustees do need to take all reasonable steps to satisfy themselves that the fund manager has appropriate knowledge and experience and is carrying out the role competently and complying with relevant legislation.

It is also worth noting that Mr S's complaint leads a series of related cases, where each claimant faced losses after transferring pensions to a Rowanmoor SSAS and investing in high-risk GPG assets. Given the similarities in these cases, the findings in Mr S's case extend to over twenty further cases. This "lead case" approach is increasingly being adopted by the Ombudsman.



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