



News Alert 2020/07

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High Court tells DB schemes to revisit past individual transfers out with GMP inequalities

At a glance

In a ruling of material significance for DB occupational pension schemes addressing their equalisation tasks flowing from a judgment two years ago, the High Court has today [made clear](#) that a DB scheme cannot rely on statutory provisions or other discharges or simply the passage of time if it paid out individual transfer values that failed to take account of any necessary uplift for GMP inequalities.

Key Actions

Trustees

- Discuss with advisers how best to factor this further equalisation task into the GMP equalisation project that should already be under way, and what priority should be accorded to these former members in this project.
- Ensure that the equalisation project is also taking into account any GMP inequalities arising from transfers received, whether on an individual or bulk basis.

Scheme sponsors

- Consider the impact on year-end accounts, engaging with auditors and advisers to see whether a provision needs to be included in respect of past transfers out and, if so, how it is recognised.

The Detail

The GMP inequality ruling handed down on 26 October 2018 (see [News Alert 2018/07](#)) in relation to three DB pension schemes sponsored by the Lloyds Banking Group made clear that inequalities in scheme benefits caused by that part of the GMP that accrued between 17 May 1990 and 5 April 1997 had to be tackled. It looked at various methods of doing so and addressed how underpayments in benefits received due to the GMP inequality issue should be addressed for members still in a DB scheme. But it was not a complete treatment of the subject and in particular did not tackle whether there was a requirement for schemes to equalise in respect of transfers out that had taken place before the judgment.

The 2018 judgment is not a complete treatment of the GMP inequality issue

Justice Morgan, who presided over the 2018 case, has now returned to examine and rule on the transfer out issue, but in so doing has added further complexity and cost to GMP equalisation exercises. Although lengthy, the judgment is neatly summed up by a few paragraphs at the end which we precis in the three sections below.

Individual transfers out made under the cash equivalent legislation

Where an individual transfer has been made under the cash equivalent legislation in its various guises over the years, the judge held that the Trustee of the transferring scheme had a duty to calculate it correctly and it should have reflected the member's right to equalised benefits. To the extent this was not done, the Trustee of the transferring scheme committed a breach of duty at the time of the transfer and the Trustee remains liable to the former member. Importantly, the Trustee of the transferring scheme is not discharged from that liability by any statutory provision or any rule of the scheme or by any agreement with the transferring member.

As such, the former member can seek a remedy against the Trustee of the transferring scheme and, in particular, an order from the Court that the Trustee belatedly perform its duty to pay the correct transfer payment. Such a claim is not time barred, either under the rules of the scheme or under the Limitation Act 1980. The Trustee is also able to perform its duty without an order of the Court.

The judge further held that the transferring scheme is under a duty to make a top-up payment to the receiving scheme (regardless of whether that scheme holds GMP liabilities) and that the former member cannot require the Trustee to set up a new residual benefit instead. Any top-up payment to the receiving scheme should reflect the shortfall due at the date of transfer with simple interest at 1% pa above base rate. However, it is open to both parties to agree an alternative to the top-up payment and it seems this could include compensation in some other form in lieu of the top-up payment.

As to how proactive the Trustee of the transferring scheme needs to be in carrying out its duty, the judge said the Trustee must consider the rights and obligations he identified, the remedies available and the absence of a time bar and then determine what to do.

Our viewpoint

The vast majority of individual transfers from DB occupational pension schemes containing 1990-1997 GMPs will have operated under the cash equivalent legislation. It is likely that most such transfers will have made no allowance for any GMP inequality uplift, since it was not clear that such an allowance had to be made until the October 2018 judgment.

Schemes are now faced with the prospect of having to revisit all such individual transfers that have taken place over the last 30 years, to ascertain whether a top-up

Many historic individual transfers out may now need to be revisited

Top-up payments will need to be made to the receiving schemes

payment is due and then to arrange to pay it to the receiving scheme. The practicalities of so doing have not been addressed by the Court, leaving individual schemes to factor such work into their GMP equalisation projects as best as they can.

Whilst the judge has left the door ajar for trustees not to be proactive in identifying, calculating and paying all such top-up payments, the trustees would have no limitation on claims being made by former members.

Bulk transfers between DB schemes made under the preservation legislation

By contrast, where a bulk transfer of liabilities has taken place between DB schemes under the preservation legislation and any rules of the transferring scheme, the judge held that a transferring member has no claim on the transferring scheme. By implication, the member will need to look to the receiving scheme to ensure their benefits are adjusted as required in relation to any GMP inequalities.

For bulk transfers the GMP inequality will likely have to be dealt with by the receiving scheme

Our viewpoint

This is a reassuring part of the judgment as the receiving scheme is best equipped to deal with the inequality issue. Most bulk transfers between DB schemes were mirror-image in nature, meaning the receiving scheme may have the necessary records to complete the calculations. Bulk transfers that were not mirror-image in nature will need careful consideration by the receiving scheme.

Individual transfers out made under scheme rule provisions

Finally, the judge addressed the situation where an individual transfer took place not under the cash equivalent legislation but instead under a provision in the scheme rules. He held that in this situation, the transferring member has no rights under the transferring scheme if the power was properly exercised and in accordance with the preservation legislation. By implication, the member will need to look to the receiving scheme to ensure their benefits are adjusted as required in relation to GMP inequalities.

Historic individual transfers that did not take place under the cash equivalent legislation are likely to have to be revisited

However, the transferring member can ask the Court to set aside the exercise of the power if the Trustee had committed a breach of duty when exercising the power. Whether such a breach occurred would require an investigation of the relevant circumstances in relation to the particular member.

Our viewpoint

Although far fewer transfers take place under scheme rule provisions, they tend to operate in a similar manner to those under the cash equivalent legislation. It is

likely that DB schemes will need to carry out the same actions in relation to these transfers as they will need to undertake for cash equivalent transfers.

Is this judgment a surprise?

For those following the GMP inequality saga, this latest and hopefully last instalment in the Court drama is not a surprise and appears to be consistent with the logic employed by the 2018 judgment. There is disappointment that a more practical solution, such as being able to pay the top-up straight to the member was not the outcome. There is little doubt that the judgment will add to the burden for trustees who already have plenty to keep them busy in this and other areas of pension scheme management.

The judgment is not so much a surprise as confirmation of further investigations required

Perhaps what is a surprise is that the implications of the judgment seem to go wider than the GMP inequality issue. It appears that a transfer payment which with hindsight proves to be faulty for reasons other than GMP inequalities may give rise to the same remedy without limitation as the Court has decided is necessary for GMP inequality-based errors.

It is now left to trustees working with their advisers to work out a proportionate means by which to address this latest challenge. For scheme sponsors, with this judgment coming towards the end of 2020, the immediate task is likely to be considering the impact on year-end accounts with (subject to materiality considerations) an adjustment being put through for the top-up payments that will need to be made.

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Lane Clark & Peacock LLP
London, UK
Tel: +44 (0)20 7439 2266
enquiries@lcp.uk.com

Lane Clark & Peacock LLP
Winchester, UK
Tel: +44 (0)1962 870060
enquiries@lcp.uk.com

Lane Clark & Peacock
Ireland Limited
Dublin, Ireland
Tel: +353 (0)1 614 43 93
enquiries@lcpireland.com

Lane Clark & Peacock
Netherlands B.V. (operating
under licence)
Utrecht, Netherlands
Tel: +31 (0)30 256 76 30
info@lcpnl.com

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