IN FOCUS

FORFEITURE IN TRUST-BASED OCCUPATIONAL PENSION SCHEMES

"6 Year, No Claim Provisions" under s.92(5)(b) Pensions Act 1995

By Thomas Seymour and Hugh Gittins

PART 1

Before 28 October 2018, when judgment was delivered in *Lloyds Banking Group Pensions Trustees v Lloyds Bank* [2018] EWHC 2839 (Ch), forfeiture of benefits in occupational pension schemes was hardly a "hot topic". Although many schemes contain some form of clause mandating or authorising forfeiture of benefits where no claim is made for pension for 6 or more years after it falls due, recourse to such provisions in administering schemes is likely to have related most commonly to cases where a beneficiary was missing and could not be traced and had not claimed, or been paid, their pension when it fell due or for 6 years thereafter. That appeared to be a paradigm case since no claim to pension had been made. By contrast, where the beneficiary had been in receipt of underpaid benefits for 6 or more years, *ex hypothesi* a claim had been made for pension and, in the absence of caselaw on the point, it may not have been immediately obvious to those running schemes, or their legal advisers, that the beneficiary could be said to have "failed to claim" the underpaid benefit thus rendering it liable to forfeiture. In the light of recent caselaw, it is now settled law that s.92(5)(b) Pensions Act 1995 applies to underpaid arrears, irrespective of fault and irrespective of the members' lack of awareness. It is said to be justified by the need to protect the scheme from stale claims. On this basis the Courts have held a range of individual forfeiture clauses to be effective to forfeit underpaid arrears and indicated that clear language would be required to restrict their application. The clarification of the law in these cases will be welcome to trustees, if less so to scheme members; but there remain

some areas of uncertainty, and some thorny issues for practitioners. In the first part of this two-part article, we examine the legal position and caselaw and offer a critique; in the second part, we shall consider some resulting thorny issues.

Background and statutory history

Section 92(1) Pensions Act 1995 imposes a general prohibition on the forfeiture of an "entitlement"[1] to a pension, or a "right to a future pension", under an occupational pension scheme, subject to specified exceptions. Section 92(5) provides:

> *(5) Subsection (1) does not prevent forfeiture by reference to a failure by any person to make a claim for pension -*
>
> *(a) where the forfeiture is in reliance on any enactment relating to the limitation of actions*
>
> *(b) where the claim is not made within six years of the date on which the pension* **[including "any benefit under the scheme or any part of a pension or any payment by way of pension"]** *becomes due.*

The words shown in bold reflect s.94(2) which provides that in ss.91-93 "pension" includes those words. Consequently it has been held, in a series of first instance decisions[2], that s.92(5) applies not only where no claim to pension and no payment have been made (missing beneficiaries being the paradigm example), but also to existing pensioners whose benefits have, for one reason or another, been underpaid – thereby enabling the underpaid arrears to be forfeited 6 years after falling due. At first blush it might seem surprising that Parliament would have intended to authorise the forfeiture of underpaid arrears of pensions in payment, particularly where the pensioner is unaware of the underpayment and where

[1] "Entitlement", although not defined in PA 1995, has been construed in *Barclays Bank v Holmes* [2000] Pens LR 339 to mean entitlement to pension in payment.

[2] *Lloyds Banking Group Pensions Trustees v Lloyds Bank* [2018] EWHC 2839 (Ch) (***"Lloyds 1"***), *Punter Southall Limited v Hazlett* [2020] EWHC 1652 (Ch) (***"Axminster"***) and *CMG Pension Trustees Limited v CGI IT UK Limited* [2022] EWHC 2130 (***"CMG"***).

the trustees are at fault; but, on the black letter, textual approach to construction adopted in the cases, this does appear to be the correct interpretation. In any event, the law must be regarded as settled on this point, subject to any appeal.

Parliament first legislated to control forfeiture clauses in the Social Security Act 1973 by prohibiting any scheme provision for forfeiture of short service benefit, including failure to make a claim for any benefit, but by exception permitted forfeiture in reliance on statutory limitation and authorised a scheme to provide for "the right to receive any payment to be forfeited if it is not claimed within 6 years of the date on which it becomes due[3]." Section 78 Pension Schemes Act 1973 replicated this provision[4]. The Goode Report (1993) recommended that forfeiture provisions be made void, except in relation to GMPs and short service benefits. Parliament did not accept or implement that in full but introduced general controls which reflected existing controls over short service benefit and GMPs[5].

It was held in *Lloyds 1* and confirmed in *Axminster* that claims for benefits by beneficiaries of occupational pension schemes are claims to "recover trust property" in the possession of the trustee within s.21(1)(b) Limitation Act 1980 and as such are subject to no statutory limitation period. Consequently s.92(5)(a) is likely be of very limited, if any, application in the case of trust-based schemes, though it remains applicable, for example, to unfunded schemes (such as executive and director's top-up schemes) which are not established under trust.

[3] SSA 1973, Sch.16, paragraph 17.

[4] The statutory history is helpfully reviewed in the judgment in *CMG* at [9]-[22]. For contracted-out schemes, forfeiture or suspension of GMPs was permitted in prescribed circumstances: s.39 SSPA 1975, replaced by s.21 PSA 1993. It was permitted in the case of *"any payment of guaranteed minimum pension for which a claim has not been made, where 6 years had elapsed from the date on which that payment became due"*: Reg.9(2)(c) OPS (Contracting-Out Regs) 1975 (SI 1975/2101), Reg.35(2) (Contracting-Out Regs.) 1984 (SI 1984/380), Reg.61 (Contracting-Out Regs.)1996 (SI 1996/1172). The period of 6 years was extended to 8 years by OPS (Schemes that were Contracted-Out) (No.2) Regs. 2015 (SI 2015/1677).

[5] This is taken from the judgment of Leech J in *CMG* at [18].

Types of forfeiture clause authorised by s.92(5)

Forfeiture clauses which may take effect pursuant to s.92(5)(b) may be classified as follows:

(1) *Permissive*, where trustees are authorised to forfeit at their discretion.

(2) *Default: forfeiture stipulated, unless discretion exercised not to forfeit*. An example would be: "If no claim to the pension/instalment or part thereof has been made within 6 years of its falling due, it shall be forfeited unless the Trustees otherwise decide".

(3) *Mandatory: where forfeiture occurs automatically after 6 years*. This is not uncommon. 4 of the 5 sample rules considered in *Lloyds 1* were mandatory. So was the forfeiture provision in *CMG*.

(4) *Mandatory subject to post-forfeiture discretion to reinstate*.

Category (3) is likely to present the most challenging issues in practice, given the draconian impact of forfeiting arrears of wrongly underpaid benefits which members have earned and of which they may have no awareness.[6] Where the trustees have discretion, the Court has provided guidance in *Axminster*, identifying the careful consideration that trustees must give to the interests of the beneficiary whose benefits have been underpaid.

The Cases

(1) Lloyds 1: *Lloyds Banking Group Pensions Trustees v Lloyds Bank* [2018] EWHC 2839 (Ch)[7]

[6] Note also that category (2) will have the same impact in circumstances where the discretion not to forfeit no longer subsists by the time the matter comes to light.

[7] In *Lloyds Banking Group Pensions Trustees v Lloyds Bank* [2020] EWHC 3135 (Ch), the Court held, also in relation to GMPE, that where the cash equivalent transfer value ought to have included a sum in respect of GMPE, a top-up payment was due to the receiving scheme; but that the sum payable was not liable to forfeiture as, being payable to the receiving scheme, not the member, it was not a benefit under the scheme or payment by way of pension, which the member would have been entitled to claim for the purposes of s.92(5)(b).

In this landmark judgment delivered on 26 October 2018, Morgan J held that non-GMP benefits in contracted-out schemes must be adjusted so that total benefits received by male and female comparators are equal. The payment due is, for convenience, referred to as "GMPE arrears". The issue arose as to whether GMPE arrears unpaid during a period more than 6 years prior to the date of judgment (that is, prior to 26 October 2012) could be forfeited under scheme rules. Morgan J reviewed 5 sets of scheme rules, 4 in mandatory terms, one conferring a post-forfeiture discretion to reinstate. He held that each was a valid rule, authorised by s.92(5)(b), so that in respect of the first 4 rules the beneficiaries were precluded from claiming arrears which had accrued due over 6 years before the date of judgment, and in respect of the last rule, the trustees had a discretion to reinstate such arrears notwithstanding forfeiture.

(2) Axminster: *Punter Southall Limited v Hazlett* [2020] EWHC 1652 (Ch)

This case, also decided by Morgan J, concerned the Axminster Scheme. Scheme amendments were arguably invalid for non-compliance with s.37 of the Pension Schemes Act 1993 resulting in significant arrears being payable. There was also a liability for GMPE arrears. A compromise was reached under which a proportion of the additional benefits, including arrears, were to be paid out, but subject to a ruling as to whether benefits accrued due over 6 years before an agreed forfeiture date were forfeited under scheme provisions and so not payable. Morgan J's judgment, insofar as it relates to forfeiture, contains rulings on two scheme provisions and whether they constituted valid forfeiture provisions under s.92(5), and helpful guidance as to the relevant principles and approach for trustees endowed with a discretion to reinstate forfeited benefits in a category (4) case.

(3) CMG: *CMG Pension Trustees Limited v CGI IT UK Limited* [2022] EWHC 2130 (Ch)

In this case, errors in the 1990s in the process of equalisation of normal retirement dates and in reducing accrual rates had been identified from 2009 onwards and led to corrective payments being made. In 2019 the employer relied on a forfeiture clause in the scheme rules to challenge the validity of the payment of arrears which had fallen due more

than 6 years before the date the forfeiture took effect. The trustee advanced a series of counterarguments. Leech J upheld the validity of the clause and held that it applied to all unclaimed benefits, including underpaid arrears not claimed within 6 years of falling due, irrespective of fault and whether or not the beneficiary was missing or was aware or unaware that the sum remained unpaid. He further held that the overpaid arrears could be recouped out of future instalments, subject to obtaining a declaration of the court, but that aspect is beyond the scope of this article.

What can be forfeited pursuant to s.92(5)(b)?

In the previous legislation, the exception corresponding to s.92(5) seemingly only applied to a pension which had come into payment, not a right to a future pension, as the words used were "the scheme may provide for the right to receive any payment to be forfeited in the event of its not being claimed"[8].

Section 92(5) is less clear because it contains no words after "forfeiture" to identify precisely what may be forfeited. If the exception matched the prohibition in s.92(1), it would apply both to an "entitlement" (i.e. pension in payment) and to a "right to a future pension".

Since s.92(5)(a) relates to limitation, and (b) is expressed by reference to "the date when the pension becomes due", it seems logical to treat it as limited to an entitlement: time cannot run in respect of a future pension until it falls due. This means that a member whose underpaid arrears are forfeited cannot also be exposed to forfeiture of that portion of their benefit after the cut-off date. The contrary has not been argued for in the cases.

The same reasoning must, we consider, hold good for missing beneficiaries, given the terms of s.92(5)(b).

[8] Section 78 PSA 1993, replacing Sch.16 para 17 SSA 1973.

To sum up, it is considered that s.92(5)(b) only authorises forfeiture of time-barred arrears.[9]

When is a clause not a valid forfeiture clause?

An initial question in considering any clause is whether it is authorised by s.92(5)(b), and if not, whether it is invalid or can be saved by construction or severance. This would be relevant for a clause which states the relevant period is 5 years (absent rectification); this would also be relevant for a clause which specified a period which might be longer or shorter than 6 years (e.g. between signing of an actuarial valuation and of the next but one actuarial valuation thereafter), unless the 6 year limit can somehow be read down into the clause to make it conform.

Words of forfeiture not required

Section 92(7) defines forfeiture as meaning "any form of deprivation or suspension … of benefit". It is not necessary to use words of forfeiture, as confirmed in *CMG* (at [93]-[94]). Indeed a common form of clause, confirmed as valid in *Lloyds 1* (at [408]), simply states that "no claim shall be made" after a period of 6 years.

Clause 25 Axminster and Clause 11 CMG

It is, however, necessary to make clear that the effect of the clause is to forfeit the member's benefit. This may require careful consideration, particularly in a clause which is predicated on no claim having been made within 6 years, but does not state in terms that no claim may be made or that there is any deprivation or suspension of the benefit. In two such

[9] There are, of course, other avenues open to trustees, including missing beneficiary insurance and an application to court for a declaration under the Presumption of Death Act 2013.

provisions, one in *Axminster*, the other in *CMG*, the Court reached opposite conclusions as to whether there was a forfeiture.

In *Axminster*, Clause 25 of the 1992 Definitive Deed and Rules[10] provided:

> *"ANY monies payable out of the plan and not claimed within six years from the date on which they were due to be paid may (at the Trustee's discretion) be applied*
>
> *(i) in augmenting the benefits of those members still in Service*
>
> *(ii) in reducing the Employer's contributions to the Plan, or*
>
> *(iii) in payment of the expenses of the management and administration of the Plan"*

Morgan J held this not to be a forfeiture provision as the trustees were not given the powers in terms which enabled them to forfeit the member's entitlement: there were no words indicative of forfeiture or disentitlement to claim benefit, and none could be read in.

In *CMG*, Rule 5.11 of the Scheme Rules provided:

> *"Notwithstanding Schedule II if a benefit or instalment of benefits is not claimed by or on behalf of the person entitled to the benefit in accordance with these Rules within 6 years of its date of payment it shall be retained by the Trustees for the purposes of the Scheme"*

The trustee argued that this clause likewise did not contain words of forfeiture, and none could be read in. Leech J held (at [93]-[95]) that this clause did authorise forfeiture, despite the absence of any words of forfeiture, because the words "shall be retained by the Trustee for the purposes of the Scheme" had the same effect as forfeiture. He also relied on (a) the opening words, which read with the overriding schedule as to GMPs indicated that this was

[10] In *Axminster* another scheme provision, Rule 36 of the 2001 DDR, also fell to be considered, which was in category (4) – mandatory with a discretion to reinstate. It is discussed below, in the context of exercise of discretion.

the intention and (b) previous scheme rules which had contained a forfeiture provision in similar terms.

The upshot appears to be that a clause directing that the money is to be retained for scheme purposes is a forfeiture provision, whilst a clause merely permitting the trustees to apply the unclaimed monies without reference to forfeiture is not.

Whilst the reasoning and decision in *CMG* make sense, that in *Axminster* is less easy to follow. The clause must have been framed against the background of what was then Sch.16 para.17 SSA 1973 authorising a 6 year, no claim provision. Morgan J declined to hold Clause 25 invalid, holding merely that it did not effect a forfeiture: yet what other effect than forfeiture could Clause 25 have, since, absent some form of deprivation of benefit, the trustee was duty bound to pay the member their absolute entitlement? In *CMG* Leech J (at [95(2)]) sought to interpret *Axminster* as having held that the provision conferred a discretion on the trustees, "where there had been an absolute entitlement before"; but this muddies the waters. First, it does not appear in Morgan J's reasoning. Second, it is inconsistent with his conclusion: displacing an absolute entitlement *would* entail a deprivation of benefit and hence a forfeiture. In short, we consider the ruling in *Axminster*, and the status of a clause in the form of Clause 25, should be treated with caution.

Current Legal Position

What follows is a summary of the legal position in the light of the cases.

Point 1: judicial approach to forfeiture provisions

Forfeiture under a clause authorised by s.92(5)(b) has a statutory rationale: the clause serves a similar purpose to a contractual limitation clause (*CMG* at [93]), serving to protect the scheme from stale claims (*CMG* at [119(1)]).

Unlike a contract, however, the beneficiary has a beneficial entitlement which has to be extinguished in order to bar the right to claim (*CMG* at [93]). Hence the need for forfeiture

to be authorised: otherwise the trustee could not apply the money freed of the beneficiary's entitlement.

Notwithstanding the benefits having been earned by pensionable service, there is "no real stigma" attached to a forfeiture provision, and hence no reason for the Court to be slow to permit forfeiture (*CMG* at [92]-[93]).

The Court will therefore adopt a neutral approach to the construction of a 6 year, no claim forfeiture clause (*CMG* at [94]). There is no justification for a narrow approach to construction, since the clause is authorised by statute, and common law principles do not apply.

Where there is ambiguity or uncertainty as to the construction of a clause in the current rules, previous rules may be admissible[11]. In *CMG*, (see [96]-[97]), Leech J took account of previous rules which supported the conclusion that Rule 5.11 was intended to be a forfeiture provision. Headings to the previous provisions were also an aid to their construction, there being no provision to exclude this (in contrast to the heading to Rule 5.11 itself which was not relied on).

Point 2: the clause need not use words of forfeiture so long as it uses words which have the same effect

Hence wording such as "no claim shall be made" (as in *Lloyds 1*, sample Rule 1) or a direction that "the trustees are to retain the money not claimed for the purposes of the scheme" (as in *CMG*) authorises forfeiture; whereas (if the ruling on Clause 25 in *Axminster* be correct despite our reservations) a clause merely conferring powers on trustees as to the application of monies not claimed within 6 years without reference to forfeiture does not.

Point 3: s.92(5)(b) is not limited to missing beneficiaries/unpaid benefits, but extends to underpaid arrears of pension

[11] *National Grid Plc v Laws* [1997] Pens LR 157 at [70]-[73].

This follows from the expanded definition of "pension" to include "any benefit under the scheme and any part of a pension and any payment by way of pension": *Lloyds 1* (at [415]-[417]), rejecting an argument that making a claim referred only to making a claim to pension, not a claim to arrears where payments were wrongly calculated or underpayments made.

Point 4: Forfeiture by reference to "a failure to make a claim" in the opening of s.92(5) does not impose a separate requirement of failure by the member, involving fault (e.g. in not claiming a benefit of which they had knowledge/notice): it simply means "not making a claim".

See *Lloyds 1* (at [417]), *Axminster* (at [207]-[214]). The term governs both s.92(5)(a) and (b). Section 92(5)(a) (which has application, at least for non-trust schemes) authorises forfeiture by reference to limitation, which presupposes no claim has been issued, but applies whether or not a claim has been made: so there is no further requirement beyond what is set out in (a). Likewise for s.92(5)(b), if no claim is made within the 6 year period, it is not necessary to ask whether the absence of a claim was the result of a "failure" involving fault on the part of the member.

Point 5: Consequently a forfeiture provision pursuant to s.92(5)(b) may take effect whether or not the beneficiary is missing and whether or not they are aware that the benefit, instalment or part is unpaid or underpaid (*Lloyds 1, Axminster, CMG*).

Clear language will be required of a forfeiture clause authorised by s.92(5)(b) if it is to distinguish between missing beneficiaries and benefits unclaimed because the beneficiary is unaware (*CMG* at [94(1)]). An example of a clause confined to missing beneficiaries can be found at *Halsbury's Encyclopaedia of Forms & Precedents* on Pension Schemes ed.2014 Vol.1(1) (Form 1, Cl.28.4) conferring discretion to forfeit where the trustees are reasonably satisfied that they are unable to trace or identify a member or beneficiary within 6 years from the date on which they became entitled to payment. As noted earlier, what may be forfeited is, we consider, confined to time-barred arrears.

Point 6: difficulty of implying a term into a mandatory provision disapplying forfeiture where beneficiary not informed of underpayment and has no means of claiming higher payment

In *CMG*, the trustee argued for an implied term that Rule 5.11 did not apply where:

(a) the trustee does not inform the member of the right to a higher payment, and

(b) the beneficiary had no reasonable means of knowing that there was a shortfall and that they needed to make a higher payment.

Leech J (at [114]-[120]) refused to imply such a term as (a) whilst reasonable, it was not necessary for business efficacy nor did it satisfy the officious bystander test: and (b) it was too wide (applying to any claim to recover an underpayment or shortfall due to administrative error or failure to apply the scheme and thus depriving the Rule of much of its force).

The implied term argument ultimately depends on the terms of the provision in question. It is not therefore impossible that an implied term argument could succeed in the context of a particular clause. But, in the light of *CMG* any court is likely to be instinctively averse to implying a term into a 6 year, no claim provision unless it is formulated in unusual terms.

Point 7: factors relevant to exercise of discretion: initial presumption in favour of making good underpayments

In *Axminster*, Rule 36 of the 2001 DDR mandated forfeiture but conferred post-forfeiture discretion to apply all or any part of the benefit to the beneficiary, or other specified applications ((a) augmentation, (b) reducing employer contributions or (c) paying scheme expenses).

In the context of the beneficiaries who were not missing but had been underpaid, Morgan J provided welcome clarification that prime consideration should be given to making good the underpayments. He held (at [263]-[266]) that:

(a) their absence of fault was relevant as was the presence of fault of the trustees, who were in breach of trust in failing to make the correct payments;

(b) the beneficiaries were not in a position to know of the underpayment and hence to make a claim to prevent time running: so forfeiture was "wholly undeserved".

(c) (by analogy with relief from forfeiture) "the first reaction of the Trustee should be to make good the earlier underpayments without further delay", unless the other uses authorised by the rule were more compelling or there were administrative difficulties justifying not doing so.

If the clause does not specify other applications, but simply directs retention of monies not reinstated for scheme purposes, there would be a choice between making good or retention for scheme purposes. Whilst the trustees have also to consider the position of the employer (who might be in financial difficulties) and the other scheme beneficiaries, it is difficult to envisage that trustees would in many cases consider it appropriate not to make good the underpayment.

In the case of missing beneficiaries, the judge's approach was more qualified, holding (at[262]) that (a) if benefits had gone unclaimed for a substantial period, it might be preferred to use them, not retain them as orphaned assets, and (b) that if the other applications were more compelling, or reinstatement would face administrative difficulties such as uncertainty in calculating the sum due, or the beneficiary had created the difficulty by going missing, the trustees might be justified in applying the money for other purposes.

Although in *Axminster* the discretion was a grant of relief *post-forfeiture* (a type (4) clause), the guidance must, we consider, apply with if anything greater force to a *pre-forfeiture* discretion (a type (1) or (2) clause). Where beneficiaries have been wrongly underpaid

benefits and are unaware that they had a claim, in no sense can it be said that the beneficiary has failed to pursue a stale claim (the supposed rationale of s.92(5)): any fault lies with the trustees, not the beneficiaries; and it would surely be untrusteelike for trustees to forfeit the arrears in such circumstances.

Point 8 : requirements of a "claim" made to prevent the 6 years running under s.92(5)(b)

As set out in the judgment in *CMG*, in order for a claim to be made which stops time running:

(i) there must be an assertion (express or implied) of a right or entitlement (*CMG* at [134]);

(ii) this need not entail awareness of the amount of the right or entitlement: but communications will be more easily interpreted as making a claim if the member is aware that the benefit or instalment is underpaid (*CMG* at [135]);

(iii) the claim must be made **after** the benefit has fallen due – except where a claim is made in advance in terms such that it can be treated as a *continuing claim* to the unpaid element (*CMG* at [135]), e.g. where Member X writes a letter claiming entitlement to payment of "all those benefits which you have failed to pay me.";

(iv) it must be a claim for "the benefit or instalment which remains unpaid". No separate claim for this is required, provided that the language used discloses an assertion of a continuing right or entitlement to the unclaimed element (*CMG* at [136]-[137]).

In *CMG*, it was argued that a claim was made by completing and returning a retirement option form. Leech J rejected this on five grounds ([138]-[140]), holding (a) the form was completed at the administrator's request to choose between options, and did not amount to assertion of a right or entitlement; (b) the forms were submitted before the payment was even made; (c) it was artificial to treat forms as a request for a shortfall which the member did not know existed; (d) it was impossible to spell out of the documents an assertion of a general right or entitlement to be paid everything to which the member was

entitled; and € the members were presented with a figure for the tax free lump sum without being aware that the stated figure was wrongly or mistakenly calculated, so one could not imply a request for more than the specific sum stated.

Given this restrictive approach, underpaid pensioners will have considerable difficulty in pointing to any communication or action as constituting a "claim" which precludes such forfeiture.

Why the Court adopted such a restrictive approach is at first sight not obvious, but it may be that the Court, having held that s.92(5)(b) did extend to underpaid benefits, was concerned to avoid an interpretation which could rob the subsection of most of its force in that regard. Pensioners in receipt of benefits will generally have completed documentation at the time of commencing payment of pension, whether relating to commutation or the periodic pension. If the initial request for pension was treated as a continuing claim for the full benefit payable, s.92(5)(b) would in practice rarely if ever apply to underpaid benefits.

A critique

The approach to s.92(5)

The Court's interpretation of s.92(5) as extending to part of a pension, and as not adding a separate requirement in terms of "failure to claim", is difficult to fault in terms of textual construction: see Points 3-6 above. Its rejection of the counterarguments was reasoned and logical.

Yet its interpretation of s.92(5)(b) appears to authorise clauses which can work significant injustice, by forfeiting underpaid arrears to beneficiaries who have been short-changed by the trustees and are unaware of their entitlement. This is highlighted in the case of a mandatory forfeiture clause with no possibility of relief or reinstatement. Such provisions, as noted, are not uncommon. As Morgan J acknowledged in *Axminster*, forfeiture in such circumstances was "wholly undeserved". Yet that is precisely the effect of a mandatory forfeiture clause of the kind approved in *Lloyds 1* and in *CMG.* Assume that,

instead of the underpayment being a relatively modest sum in absolute or proportionate terms, it represented the lion's share of the pension; and assume that the underpayment had continued for perhaps 20 or more years. Can it really have been the intention of Parliament that beneficiaries could, through a combination of wrongful underpayment and late discovery of the error, be deprived via a forfeiture clause of what might prove to be a significant part of their benefits?

It is a presumption in statutory interpretation that Parliament does not intend a statute to have consequences which are unreasonable and unjust: *Bennion, Bailey & Norbury on Statutory Interpretation* (8th Ed.) at para.26.3[12]. The judicial response to this would doubtless be that, despite the draconian effect, it is not unreasonable for Parliament to have intended to protect schemes against the uncertainty of old claims, and to have robustly prioritised this over the interests of beneficiaries in having their benefits paid in full in all circumstances of underpayment of benefit, irrespective of fault. The likelihood is, we suggest, that Parliament had no such intention (and that it simply did not address its mind to the unjust consequences of forfeiting underpayments of which beneficiaries were unaware), but the legislation cannot readily be construed in any other way.

It may also be said that the Court's approach sits somewhat uneasily alongside the statutory rationale, stated in *CMG* to be the purpose of barring stale claims. How can the claim of the beneficiary be characterised as "stale" where they are in receipt of their benefits but left unaware of their true entitlement, so that failure to make a claim for the underpayment is not their fault, but the fault of the trustees? The judicial response would doubtless be that, as in the context of limitation and s.92(5)(a), a claim is stale if it is not made, irrespective of knowledge.

[12] In *R (on the application of Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20 Lord Millett said in relation to double taxation: "The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless. … But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it."

Again, the more incompetently a scheme is administered, the more the underpaid beneficiaries are exposed to wholly undeserved forfeiture of benefits under a mandatory forfeiture provision. This is illustrated in *CMG*, in which historic defective amendments were then compounded by a prolonged failure to ascertain the error, by which time benefits had been underpaid for many years.

The impact of the forfeiture on the trustee's liability for breach of trust and maladministration is not discussed in any of the cases. Since forfeiture extinguishes the beneficiary's entitlement to the arrears, presumably the Court would hold that the trustee's correlative liability for breach of trust and maladministration (at least where such breach of trust or maladministration is innocent – see Part Two of this article in relation to knowing breach of trust) is likewise extinguished, so the trustees get off scot-free, leaving the innocent and underpaid beneficiary without entitlement or remedy. At this point the stated rationale of protecting the scheme from stale claims rings a little hollow.

The approach to construction of forfeiture provisions

Just because a forfeiture clause authorised by s.92(5)(b) may extend to any part of a pension or payment by way of pension, it does not follow that all clauses not limited in terms to missing beneficiaries are required to be so construed. Clearly if the clause refers to "part" of a pension/benefit/instalment, as does s.94(2), it must be so construed. But a clause need not have the full scope authorised by s.92(5)(b) and s.94(2) cannot simply be read down into the forfeiture provision. So, taking for example a provision such as Rule 1 in *Lloyds 1* which prohibits a beneficiary from claiming "any instalment of pension or other benefit" more than 6 years "after that instalment has fallen due" one asks why that should not, adopting a neutral construction, be limited to the instalment *as it was computed and stated to be payable by the trustees and administrators of the scheme:* why does it have to extend to the undisclosed part which was not computed or identified by the trustees/administrators or treated as part of the instalment falling due at the time? Addressing this at [408], Morgan J stated correctly that the rule is not confined to where the pension was not claimed and nothing was paid, as it

referred to "instalment", but deduced that it must apply to cases where the trustees had made payments (that is correct) "but have underpaid the beneficiary". This appears to omit an analysis that treats the provision as applying to the instalment of pension as computed and stated to be payable. Morgan J adopted the same, terse, reasoning at [408] to apply to all the rules before him. In the case of forfeiture provisions which refer to "any pension or benefit or instalment" there might also have been scope for a construction confining the scope to the pension or benefit or instalment as computed and stated to be payable, so that it did not bite on undisclosed arrears. Provisions cast in terms of "any sum payable" or "any monies payable" may less easily lend themselves to such an interpretation, but it would not seem unarguable. Leech J's approach to the forfeiture provision in *CMG* was that it was expressed in general terms and not confined to missing beneficiaries, and that clear language would be required to restrict it to them. Again, this seems to overlook an analysis which treats the provision as applying to the pension or benefit as computed and stated to be payable by the trustees/administrators. The fact that the statutory rationale of s.92(5) was to protect the scheme against stale claims should not, we suggest, drive a construction of that clause that is wider than the language readily justifies. The fact that the outcome would leave beneficiaries, whose entitlement to the disclosed benefit has been forfeited, entitled nevertheless to claim the undisclosed underpayment, flows from the proper construction of the provision and is not of itself objectionable as being anomalous or illogical.

Despite the above critique, the fact is that the Courts have now authorised forfeiture provisions in a variety of forms to extend to underpaid arrears; it will take a bold judge at first instance to take a different course, unless the language of the forfeiture provision is markedly different and warrants a narrower interpretation; that apart, any significant reconsideration of the scope of forfeiture provisions under s.92(5)(b) is unlikely until there is a case which goes to appeal.

Part II will follow in a separate issue

Thomas Seymour is a Chancery barrister practising at Wilberforce Chambers and specialising since the 1990's in the field of pensions. Hugh Gittins is a Senior Counsel at Slaughter and May specialising in pensions law.

Published January 2023