

Pensions liberation update – November 2013

Pension Liberation Fraud – Court judgment does little to aid trustees

The High Court has handed down a judgment following a case that was brought by the Pensions Regulator (tPR) against nine alleged pension liberation arrangements. While the decision assists tPR, it does not provide much help to trustees faced with the dilemma of whether to agree to a transfer request where the receiving scheme appears to be involved in liberation activity.

This note outlines the outcome of the judgment, summarises tPR's expectations on how trustees should deal with a suspicious transfer request and suggests some practical tips for trustees where they encounter liberation activity.

The judgment

The Court ruled that the nine schemes were 'occupational pension schemes' within the meaning of the Pension Schemes Act 1993. Since the schemes have been classed as occupational pension schemes:

- transfers from other pension arrangements to those schemes would not, of themselves, be unauthorised payments; and
- tPR had authority to exercise its statutory powers to replace the schemes' trustees with independent trustees (it did so originally in an attempt to cease the suspected pension liberation activities being carried out by those schemes).

The judgment clarifies the powers tPR can use in relation to suspected pension liberation schemes, and so provides a blueprint for future interventions by tPR.

However, the judgment was narrow in its scope as it centred on the specific language and construction of the schemes' governing documents. Notably, the Court was not asked to consider whether the schemes were "sham" arrangements, intended to operate as fraudulent pension liberation schemes. Had the Court tackled this question, it may have provided trustees with some clarification on how they could legitimately obstruct a transfer request.

tPR's position on the approach trustees should take to transfers

tPR's efforts in ensuring members do not fall victim to liberation scams should be applauded. However trustees might not appreciate the full extent to which tPR expects them to protect their members.

When processing a transfer request, tPR expects trustees and administrators to look out for the following warning signs:

- the receiving scheme is either not registered with HMRC or has only recently been registered;
- the member is attempting to access their pension before age 55;
- the member is pressuring the trustees to complete the transfer quickly;
- the member was approached unsolicited to make the transfer;
- the member has been informed that there is a "legal loophole"; and/or
- more than one member has requested a transfer to the same scheme and that scheme is previously unknown to the trustees.

If any of the above warning signs are present, tPR suggests that the trustees find out more about the receiving scheme. This might involve the following action:

- checking with HMRC that the scheme is registered (HMRC may also disclose whether they have any information to indicate there is a significant risk that the scheme is being used for pension liberation);
- asking the member for copies of the promotional materials about the receiving scheme; and/or
- asking the member about how they became aware of the receiving scheme.

tPR acknowledges that trustees may have a legal obligation to pay the transfer value. However, tPR suggests that, if the trustees have reason to believe the receiving arrangement is not a legitimate pension scheme, they should "consider carefully" whether the transfer request has been made validly and, where appropriate, take legal advice.

What are the trustees' legal obligations?

Trustees of pension schemes may question why the nature of the receiving arrangement is any of their concern. If the member has submitted a request for a cash equivalent transfer value and the receiving arrangement is registered with HMRC, why should the transferring trustees concern themselves with what might or might not be the intention with regard to the member's benefits following the transfer? There is also the question of how far the trustees can pragmatically investigate a transfer request whilst complying with the strict statutory time limits on processing that request. It seems a stretch to suggest that the trustees' fiduciary duties towards members extend to checking a member's decision to transfer and the motives behind the transfer request.

However, transferring trustees will generally be concerned to ensure that once they have paid the transfer value, they no longer have a liability to pay benefits to or in respect of the member. The transfer value legislation includes an obscure provision which applies where a court order is made in respect of a pension liberation scheme to the effect that the transferring trustees will not obtain a statutory discharge unless they had taken "all reasonable steps" to satisfy themselves that the trustees or managers of the receiving scheme are acting in good faith in relation to that scheme. While the absence of this statutory discharge is not necessarily a disaster – a discharge in the transferring scheme's rules or a discharge signed by the member as part of the transfer process should both be effective – a statutory discharge does tend to put matters beyond any doubt.

So what should trustees be doing?

It is likely that the actions certain trustees have taken in relation to transfer requests concerning suspected liberation schemes will be tested by the Pensions

Ombudsman and, perhaps, the Court in the not too distant future. The outcome of such complaints and cases will hopefully provide trustees with more concrete guidelines on how to approach the dilemma of a transfer request involving a suspected liberation scheme.

In the meantime, trustees could take the following action:

- enclose tPR's leaflet highlighting the dangers of pension liberation schemes with all transfer packs;
- ask members for some background information about the receiving arrangement and the reasons behind the transfer;
- where suspicions are raised in relation to the receiving scheme, verify the details of that scheme through independent sources such as HMRC; and
- check their scheme's standard transfer packs and documentation to ensure they contain a statement from the member that the member has read and understood tPR's leaflet on pension liberation schemes and that there is also a written discharge from the member.

It will be important for the trustees to keep good records of their correspondence with members so that, if necessary, they can demonstrate that they took "all reasonable steps" to satisfy themselves about the receiving scheme.

Transferring trustees may wish to get in touch with their legal advisers for more information about the steps they should take to identify pension liberation schemes and for advice on how to deal with a situation where a member insists they make a transfer to an arrangement that appears to be involved in liberation activity.



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