Public Aspects of Pensions Law

Judicial Review of the Regulator's use of its moral hazard powers

1. Overview

This section of the paper will explore three keys points concerning the judicial review of an exercise by the Pension Regulator ("**tPR**") of its moral hazard powers.

This section of the paper is likely to be of greatest interest to anyone against whom tPR has issued, or intimated that it might issue, a warning notice ("**WN**") concerning any of tPR's moral hazard powers (a "**Target**"). It will also be of interest to anyone who has been named as a Directly Affected Party in such a WN, such as the Trustees of the pension scheme or schemes in question, the (former) scheme employer or employers, or any liquidator of the latter.

First, I explain why it will not generally be possible to judicially review an exercise by tPR of these powers, but that such arguments could instead be made to tPR's Determinations Panel ("**the DP**").

Second, I set out my thoughts on when it might still be possible to bring a judicial review of tPR in the High Court in relation to an exercise of these powers.

Finally, I set out my thoughts as to how the DP might approach a hearing in which such arguments were put to it.

Before turning to these points, I have set out some background context to judicial review claims, and tPR's moral hazard powers, for those that are new to either topic.

2. Background Context

A. Judicial Review Claims

A judicial review challenge can be brought against any entity (although it will usually be a public body) in relation to its exercise of what a court has determined to be a public function. The challenge can concern any combination of a decision, an act, or a failure to act on the part of the entity in question, in relation to that public function.

There are broadly three grounds on which such a challenge can be brought:

> The first is that the entity has acted **illegally**: it had no power to do what it has purported to do.

The second is that the act, omission, or decision was **irrational**: it was 'so unreasonable that no reasonable (equivalent) public body would have done the same' see e.g. ***Associated Provincial Picture Houses Ltd v Wednesbury Corp*** [1947] 2 All E.R. 680, [1948] 1 K.B. 223.

The third is that there has been some significant **procedural unfairness** in what the entity has done and/or a failure to fulfil a legitimate expectation held by the claimant.

Judicial review claims are brought in the High Court, and a potential Claimant must first obtain permission to bring such a claim. This is generally determined by the court as a distinct first stage of the proceedings, and usually on the papers alone. The question of permission can also be addressed at the hearing of the judicial claim itself, as part of a 'rolled up' hearing.

If the challenge is successful, the judicial review court has the power to award a broad range of remedies, including a quashing order, or requiring the entity in question to think again.

B. tPR's Moral Hazard Powers

It is assumed that the reader is likely to be familiar with tPR's moral hazard powers, and the relevant provisions of the Pensions Act 2004. For the avoidance of doubt, by reference to these powers I mean tPR's power to issue a contribution notice ("**CN**") or a financial support direction ("**FSD**").

tPR exercises these powers by:

its case team first issuing a WN to the Target or Targets of the CN and/or FSD

the DP, an internal but separate determination body, determining that the case in the WN is made out in accordance with the tests in the Act.

Both of these stages have been treated by the courts as the 'exercise of a public function' (as to which see below) and so could in theory be subject of a judicial review challenge.

3. First Key Point: Such Challenges Must Generally Be Made To The DP Itself

Summary: The starting point is that it will not generally be possible to bring a judicial review in the High Court of the Regulator's exercise of its moral hazard powers. Rather, such arguments must be raised before the DP itself. This is the *ratio* of ***Silentnight***, reported as *Grace Bay II Holdings Sarl v The Pensions Regulator* [2017] EWHC 7 (Admin); [2017] Pens L.R. 7.

In ***Silentnight***, the Targets brought a judicial review challenge on the grounds that tPR had acted both illegally and unfairly in issuing a second WN against them. Whipple J, at a 'rolled up' hearing, refused permission in relation to both grounds on the basis that the Targets had an 'alternative remedy' to judicial review in the form of the DP and its procedure, and then if necessary the Upper Tribunal.

Whipple J followed a line of case law on WN's issued by the (then) FSA pursuant to its powers under *The Financial Services and Markets Act 2000*, which are similarly determined by an internal 'Regulatory Decisions Committee' ("**RDC**"). These decisions held that, absent "*exceptional circumstances*", such a challenge could and should be made to the RDC, and so by analogy to the DP.

This existing body of case law held that this was so even where the judicial review challenge was brought on grounds of:

> illegality (alleging that the FSA had no such power at all), per ***R. (on the application of Davies) v FSA*** [2003] EWCA Civ 1128; [2004] WLR 185;
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> irrationality (alleging that no reasonable regulator would have done the same), per ***R v Birmingham City Council, ex parte Ferrero Limited*** [1993] 1 All ER 530 (CA); and/or
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> a failure to give adequate or proper reasons, per ***R. (on the application of Willford) v FSA*** [2013] EWCA Civ 677; (Unreported: 13 June 2013).

In light of these decisions and others, Whipple J held that there was "*nothing exceptional about [the] challenge which warrants judicial review*": see the judgment at [79].

Silentnight concerned a WN issued by the Regulator's case team, rather than a decision of the DP itself to issue a CN and/or FSD. Nonetheless, the same logic applies to such a latter decision of the DP itself: as the judicial review claimant would have an 'alternative remedy' in form of a reference to Upper Tribunal, then if necessary the Court of Appeal etc: see ***Willford v FSA*** (cited above), at paragraphs 9, 11, and 38, per Moore-Bick LJ, with whom Black LJ agreed at paragraph 53.

4. Second Key Point: The Threshold To Bring A Challenge In Court Is A High One

Summary: ***Silentnight***, and the case law on which Whipple J relied, only went as far as to hold that it would require "*exceptional circumstances*" for it to be appropriate for a potential claimant to be granted permission to bring a judicial review challenge in the High Court. However, the decision suggests that this is a very high threshold, as can be seen from the following.

The most obvious potential line of argument for a claimant seeking to establish that permission should be granted in their case is that the circumstances of their case are truly exceptional. This however falls to be assessed in light of the principles as summarised by Whipple J at paragraph 59 of her judgment. These include:

> The court taking account of whether granting permission in case before it would lead to such judicial review challenges becoming routine.
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> That the court should not grant permission in the case before it merely because judicial review in the High Court would be a more effective or a more convenient procedure.
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> The need for the court to determine whether Parliament intended the statutory DP procedure to apply in any event.

In ***Silentnight*** the Targets submitted that their case was truly exceptional in light of the (high) cost of responding to the case in the second WN. Having considered the principles set out above, this was rejected by Whipple J: see the judgment at paragraph 78.

A second potential line of argument for such a claimant would be to submit that the alternative remedy is itself unsatisfactory in the circumstances. At paragraph 59 of her judgment, Whipple J refers to this type of submission as the usual way to establish "*exceptional circumstances*". However, in the same paragraph, she goes on to hold both that:

> The mere fact that the DP does not have the power to grant the same broad range of remedies as the judicial review court, including in particular that it does not have the power to quash or remit decisions, does not mean that the DP procedure is inappropriate; and
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> That the existence of the right of appeal by way of rehearing to the Upper Tribunal, is capable of remedying even any serious defects in the DP's procedure.

This suggests that "*exceptional circumstances*" is a very high threshold.

Outside of the above-mentioned moral hazard powers, another important area is the issuing of s.72 notices by tPR, which have the capacity to be costly to comply with, so the lawfulness of such a notice is often an important issue for clients. The focus in such a case should be on whether (a) the notice is sufficiently clear to allow the addressee to know what falls within and outside it, which is important given the consequences of not complying with it, and (b) whether the decision to issue the notice was a proper one given its contents. [1]

5. Third Key Point: It Is Not Yet Clear How The DP Itself Might Approach Such A Challenge

Summary: the starting point is that such a challenge must generally be made before the DP itself. It is at present unclear how the DP will approach such arguments if and when they are made to it. This area will be one to watch.

The DP has not to date had to consider how it would approach such arguments. To date, it has generally held short hearings in relation to WN's concerning CN and/or FSD's and has only allowed even cross-examination at one such hearing, that for ***Sea Containers*** [2007] 40 PBLR in 2007; a procedure which it has notably not since repeated.

There is no reference in the DP's published Standard Procedure to such issues being addressed before the DP, and so it contains no special provisions in relation to them. There is also notably no reference in the Standard Procedure to the DP, for example, convening a separate hearing on a preliminary issue.

In light of the above, it remains to be seen how the DP might address such arguments, and this will be something to watch in the future.

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[1] Outside the tPR context, there is also the possibility in theory of judicially reviewing the PPF in respect of the promulgation of their levy determinations.