IN FOCUS

ACCESSING A TRAPPED SURPLUS ON WINDING UP A SCHEME: THE OPERATION OF S.69 PENSIONS ACT 1995 VS A RESULTING TRUST

By Jennifer Seaman, Wilberforce Chambers

Introduction

Funding levels in the Defined Benefit (DB) pension sector have hit a record high, with three in four schemes now in surplus.[1] The Government has announced plans to allow new freedoms for employers to access scheme surpluses, to boost investment and benefit scheme members, as part of the Government's "Plan for Change". This includes statutory reforms in the Pension Schemes Bill to give trustees the power to modify their scheme rules to provide for surplus sharing with employers, where existing scheme rules do not allow for this.[2]

As things currently stand, some schemes (especially older schemes which reflect the conditions for approval when such schemes were established) may not expressly permit a refund of a surplus to the employer, or not allow an amendment of the scheme rules to permit a payment of surplus to the employer (i.e. there is a "trapped surplus").[3] This article analyses the interaction between two current methods[4] for accessing trapped surpluses in such schemes, which are in wind-up:

a. Section 69 of the Pensions Act 1995 ("**s.69**") – a modification order by TPR;
b. A resulting trust

[1] DWP Press release dated 21 May 25.

[2] See section 8 and 9 of the Pensions Scheme Bill 2025, dated 5 June 2025. The Government has indicated that Royal Asset will be given around April 2026, and anticipates that surplus regulations and guidance will come into force by the end of 2027.

[3] Or such schemes oblige the trustees to use the surplus for members, in which case there may be an initial surplus after the scale benefits have been insured, but there will be no ultimate refundable surplus after augmentations.

[4] Before the changes to be introduced in the Pensions Schemes Bill 2025

S.69 – a modification order by TPR

S.69(1) states:

"(1) The Authority [TPR] may, on an application made to them by the trustees of a registered pension scheme which is being wound up, make an order –

(a) Modifying the scheme for the purposes of enabling assets remaining after the liabilities of the scheme have been fully discharged to be distributed to the employer, or

(b) Authorising the trustees to modify the scheme for that purpose…."

Section 70 of the Pensions Act 1995 contains supplementary provisions to section 69:

"(1) The Authority may not make an order under section 69 unless they are satisfied that the purposes for which the application for the order was made –

(a) Cannot be achieved otherwise than by means of such an order, or

(b) Can only be achieved in accordance with a procedure which –

(i) Is liable to be unduly complex or protracted, or

(ii) Involves the obtaining of consents which cannot be obtained, or can only be obtained with undue delay or difficulty.

(2) The extent of the Authority's powers to make such an order is not limited, in relation to any purposes for which they are exercisable, to the minimum necessary to achieve those purposes."

Section 71 of the Pensions Act 1995 contains provisions on the effect of orders under section 69:

"(1) An order under paragraph (b) of subsection (1) of section 69 may enable those exercising any power conferred by the order to exercise it retrospectively (whether or not the power could otherwise be so exercised) and an order under paragraph (a) of that subsection may modify a scheme retrospectively.

(2) Any modification of a scheme made in pursuance of an order of the Authority under section 69 is as effective in law as if it had been made under powers conferred by or under the scheme.

(3) An order under section 69 may be made and complied with in relation to a scheme –

(a) in spite of any enactment or rule or law, or any rule of the scheme, which would otherwise operate to prevent the modification being made, or

(b) without regard to any such enactment, rule or law or rule of the scheme as would otherwise require, or might otherwise be taken to require, the implementation of any procedure or the obtaining of any consent, with a view to the making of the modification.

(4) In this section, "retrospectively" means with effect from a date before that on which the power is exercised or, as the case may be, the order is made."

TPR's use of s.69

The 1924 Pension Fund[5]

On 7 May 2010, the Determinations Panel (the "**Panel**"), on behalf of TPR, made an order under s.69 (the original version) for the Liberal Headquarters 1924 Pension Fund, after taking into account the submissions of the trustees and the employer, the Liberal Democrat Party. The Fund had assets but no remaining members or liabilities because it had been superseded by another pension arrangement. The employer and the trustees did not otherwise have the power to amend or wind up the Fund. The employer indicated to TPR that the net assets of the 1924 Scheme would be contributed to another fund. The Panel agreed that it was appropriate to make a s.69 order, authorising the modification of the Fund so that upon its winding up, any surplus should be returned to the employer, and under s.11(1)(b) of the Pensions Act 1995, winding up the Fund on the basis that it was no longer required.

The Wright Health Group Ltd Scheme[6]

The trustee of the Wright Health Group Ltd Superannuation & Life Assurance Scheme made an application to TPR under s.69(1)(b) (before the 2016 amendments to s.69), to try to modify the Scheme to enable it to return a proportion of the surplus left following payment of all wind-up costs and expenses to the employer, as the trustees did not have the express power to do this under the Scheme's rules. The surplus was to be used by the employer to meet future defined contribution costs of the former final salary scheme members (payable to the defined contribution scheme). The trustee had received legal advice that that the alternative route of the surplus being returned to the employer on a resulting trust declared by the court (as discussed below), would be less certain, and complex and protracted. TPR's case team was of the view that the power should be exercised.

However, after requesting further information from the parties, in July 2013 the Panel declined to make an order under s.69. The Panel remained concerned that it did not have sufficient information to understand

[5] TPR Ref: TM7876
[6] TPR Ref: C14920906

what assets would remain after the Scheme had entered into an agreement to buy-out and then completed the winding-up of the Scheme. The Panel was also concerned that the trustee and the employer had not taken account of the effect of a rule in the Scheme which provided for the use of any balance remaining in the Scheme when it was being wound up. The Panel decided that such a rule placed the trustee under an obligation at law (or 'liability') to distribute any surplus on a winding up to members or other persons mentioned in the rule, and this fell within the meaning of the phrase "liabilities of the scheme" in s.69(3)(b) (before its repeal in 2016)[7]. It was not clear to the Panel whether there were any assets remaining after the liabilities had been fully discharged which could be distributed to the employer. The Panel was also concerned that it had not been provided with sufficient information by the trustee about alternative means of achieving the same purpose (as required by s.70 Pensions Act 1995). It was open to the trustee to submit a new application with additional application if it wished to do so in the future. (Although it does not appear that the trustee did submit a further application.)

The Littlewoods Pension Scheme[8]

In the Littlewoods Pension Scheme, the trustee had no power to distribute the surplus to the employer under the Scheme rules. The Scheme was closed to new members and future accrual, and since that time, the principal employer had paid an additional £32.5m to the Scheme. The Scheme then entered into buy-out and winding-up, leaving a surplus of around £10-12m.

The trustee considered whether the surplus could be paid on the basis of a resulting trust. However, given the Scheme's long history and large number of participating employers over the life of the Scheme (some of which had been dissolved[9] and some of which had been sold and continued to exist in separate ownership), the process of trying reconstruct where the surplus assets had come from, and over what period, would be challenging and impossible to complete with "any degree of accuracy" (§43 of the Determination Notice). The Panel agreed, and stated that any application to court for a declaration of a resulting trust would be uncertain and likely to involve significant costs (§61 of the Notice).

[7] The original S.69(3)(b) stated: *"The purposes referred to in subsection (1) are…. (b) in the case of an exempt approved scheme (within the meaning given by s.592(1) of the Taxes Act 1988) a registered pension scheme under s.153 of the Finance Act 2004 which is being wound up, to enable assets remaining after the liabilities of the scheme have been fully discharged to be distributed to the employer, where prescribed requirements in relation to the distribution are satisfied…"*

[8] TPR case ref: C212251039

[9] Raising questions of 'bona vacantia', which may require the Crown to be represented (See HMRC – PTM145200)

In February 2025, the Panel issued an order under s.69(1)(b), authorising the trustee to modify the Scheme for the purpose of enabling the assets remaining after the liabilities of the Scheme had been fully discharged to be paid to any one or more of the persons who fell within the definition of the "employer". The Panel determined that the trustee was in a better position to decide on the identity of the employer for the purposes of s.69(1) and to consider any competing claims from different employers to the surplus. The s.69 order gave the trustee the power to distribute assets to an employer once the trustee was satisfied that the liabilities had been discharged, where there would not otherwise be that power (§69 of the Notice). The Panel also concluded that the "purpose" under s.69 was distributing the surplus to the employer (§59 and 62 of the Determination Notice).

To achieve this s.69 order from TPR, the trustee had submitted the application to TPR in July 2023 and then further evidence in March 2024 to demonstrate that all of the legal tests required for a modification order to be made were satisfied, including confirmation that the trustee considered that the most appropriate course was for the entirety of the surplus to be paid to the employer, notwithstanding its refusal to consent to further augmentation of benefits for members.

The trustee also confirmed that the requirements under s.76(3) of the Pensions Act 1995 would be met (requirements to exercising a power to distribute surplus to the employer on winding up). The Panel's view was that this was not directly relevant to the question of whether it should make an order under s.69, but it took the trustee's confirmation on s.76 into account (§70-72 of the Notice).

A resulting trust – as an alternative route

A resulting trust can arise where X transfers property to Y on express trusts, but the trusts declared do not exhaust the whole beneficial interest.

In *Davies v Richards & Wallington*,[10] Scott J recognised that a resulting trust could arise if not excluded by the express or implied terms of the trust, in favour of the contributors to the scheme.

In *Air Jamaica v Charlton*,[11] where the trust deed of a discontinued DB scheme which was partly void for perpetuity contained a clause which provided: "*No moneys which at any time have been contributed by the*

[10] [1990] 1 WLR 1511
[11] [1999] 1 WLR 1399

company under the terms hereof shall in any circumstances be repayable to the company", Lord Millett said as follows:[12]

> "*Prima facie the surplus is held on a resulting trust for those who provided it…the resulting trust arises by operation of the general law, dehors the pension scheme and the scope of the relevant tax legislation.*"

In *Re abrdn (SLSPS) Pension Scheme*,[13] the Court of Session, in an Opinion delivered by Lord Tyre, gave directions for a Scottish pension scheme which was closed to new members and to future accrual and facing buy-out. The DB benefits were almost exclusively funded by the participating employers and the scheme is in surplus in the amount of around £500m - £1bn gross. The scheme rules appeared to make no provision for surplus assets and prohibit any amendment which would permit payment to be made to the employers (except in the event of the principal employer being wound up, which was not envisaged). The Court gave the following directions (as a matter of Scots law and therefore not binding in England and Wales):

(a) The remaining assets of the scheme were the subject of a resulting trust arising as a matter of law. Court to a passage from *Haig v Lord Advocate*:[14]

> "*If circumstances arise in which the trustees are holding funds without there being any provision in the trust deeds and rules directing them as to the disposal of the funds, the disposal must be regulated by the application of the law. If the law provides that, in the circumstances, the funds must be returned to the company, it is the law which so provides and not the deeds.*"

At [33], the Court held:

> "*The essence of the emergence of a resulting trust is that the purpose of the trust has been fulfilled, leaving a surplus of funds in the hands of the trustee which is not required for the trust purposes. In those circumstances the truster becomes entitled to have the unused funds returned to him…*"

(b) The resulting trust operated in favour of the scheme's participating employers as remained at the date when there came to be no members remaining in service under the scheme, and the resulting trust operated as a matter of law only when (i) the buy-out had been completed, (ii)

[12] Ibid, at 1411.
[13] [2023] CSIH 31
[14] 1976 SLT (Notes) 16 at 17-18 per Lord Ordinary (Kincraig)

sufficient provision had been made for any remaining liabilities and (iii) sufficient provision had been made for the expenses of completing the winding-up.

Analysis of the two methods – s.69 TPR order and a resulting trust

As set out in s.70(1) of the Pensions Act 1995, TPR may not make an order under s.69 unless it is satisfied that the purposes for which the application for the s.69 order was made (i.e. the modification of the scheme to release a trapped surplus to the employer, in a registered pension scheme being wound up) (a) cannot be achieved otherwise than by means of a s.69 order, or (b) can only be achieved in accordance with a procedure which is liable to be unduly complex or protracted. Therefore, TPR will need to be persuaded first that a resulting trust alternative is not achievable or is unduly complex or protracted, before it makes a s.69 order.

The Determination Notices in the *Wright Health Group Ltd Scheme* and the *Littlewoods Pension Scheme* cases highlight that TPR, in considering a s.69 application, will want to be provided with sufficient information by the trustee about alternative means of achieving the same purpose and therefore, what would be involved in paying the surplus to the employer under a resulting trust.

Given the amounts usually at stake, the significance of the payment of the surplus to the employer in winding up and ending the scheme, and the terms of the express powers in the scheme rules which might prohibit a payment to the employer, it is assumed that a trustee of such a scheme is likely to want a court declaration on the existence and operation of a resulting trust, before paying a surplus to the employer under such a trust (e.g. in the *Re abrdn* case).

In the *Littlewoods Pension Scheme* case, TPR appears to have relied on the following points to satisfy itself that a s.69 order was appropriate, rather than a resulting trust route:

(a) The Scheme had a long history and a large number of participating employers over its lifetime. It would be impossible to accurately complete the re-distribution of the surplus back to where it had come from.

(b) The resulting trust route was likely to be a complex process, and the trustee might properly consider it prudent to seek court approval, which is likely to be unduly complex or protracted.

(c) An application to court for a declaration of a resulting trust would be uncertain and likely to involve significant costs.

The decision in *Re abrdn,* although not an English case, may suggest that obtaining a resulting trust declaration by the court to release a trapped surplus on a winding up is simple, and not unduly complex or protracted. However, contrary argument was not heard in *Re abrdn* as there was no opposing party (known as the "contradictor")[15], and points about to whom the money was to result did not appear to be complex or protracted, and the parties were agreed on the result. The ease of achieving a resulting trust declaration might therefore depend on the specific facts involved in a case, rather than on questions of legal analysis.

Conclusion

The current correct route to release a trapped surplus in a scheme winding up, where there are express prohibitions in the rules on returning the surplus to the employer, may be fact and scheme specific. In a scheme which has been long-existing, has had a number of participating employers and where it is difficult to return the surplus in an accurate manner, a s.69 application may be appropriate. Alternatively, if there has just been one employer or if all the employers are agreed on the route of the resulting trust, there is no member or trustee objection, and a court application could be put together relatively simply and in a cost-effective manner, the resulting trust route might be the primary focus (given s.70(1) of the Pensions Act 1995).

These current routes for releasing a trapped surplus on a winding-up will be subject to change on the introduction of the new legislation and regulations and guidance in around 2027.

Published July 2025

The author is grateful to Anna Rogers of Arc Pensions Law (who acted for the trustee in the Littlewoods Pension Scheme case before TPR), and Paul Newman KC for their comments on an earlier draft of this article. Any errors or omissions remain the author's own.

[15] The Court commented at [28]: *"There is however an issue in relation to the presence of a contradictor. As already noted, the participating employers presented an argument which was wholly supportive of the petitioner. If there is a real contradictor, it is the Crown which might seek to argue that all or some of the assets in the fund ought to be treated as bona vacantia rather than being held on a resulting trust in favour of the employers. The petition was not served on the Crown and so no opportunity was afforded for such an argument to be presented. It is regrettable that service was not effected on the Crown, but in the circumstances of this case we are satisfied that it was unnecessary as none of the assets will become bona vacantia…"*