THE THORNY ISSUE OF PENSION LIBERATION

Brambles Administration Ltd v Harvey [2025] EWHC 2980

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Introduction

In *Brambles Administration Ltd v Harvey* [2025] EWHC 2980, the High Court considered an appeal from the Deputy Pensions Ombudsman ("**the Ombudsman**"). This case involved three registered pension schemes (respectively the Eleven Scheme, the SHK Scheme, and the Gilbert Scheme, together referred as "**the Schemes**"). The first appellant, Brambles, was the manager of the Schemes. The other appellants were either individual trustees (Mr McNally and Mr Kaigh) or corporate trustees (Eleven Property and Gilbert Trading) (together referred to as "**the Trustees**") of the Schemes. The respondents were members who had brought complaints against the Schemes.

In the Determination of 11 November 2024 ("**the Determination**"), the Ombudsman found that every single one of the Schemes' investments were worthless. Findings were made that the appellants had been dishonest as well as that there had been other breaches of duty and maladministration. The appeal was brought on four grounds, relating to the time limits for bringing complaints, the nature of the Schemes, the test for dishonesty, and contributory negligence.

Background

The Schemes invested in a range of investments, such as leases of storage boxes as well as shares in private companies. In the Determination, the Ombudsman concluded that all the investments were high-risk, unregulated, and highly illiquid.

The Schemes were involved in 'pension liberation' arrangements designed to circumvent the rules preventing members of pension schemes from accessing funds until they turned 55. The idea was that, instead of making a straightforward contribution to a Scheme, a member would 'buy' an asset X for say 100 and would then 'sell' asset X to the relevant Scheme for say 120. This therefore created the fiction that the member had made a capital gain on the sale of asset X rather than an early access of pension benefits. In line with this 'arrangement', members were asked to sign pre-populated 'member-directed investment forms' ("**the Forms**"), which purportedly instructed the Schemes to apply sums held on behalf of that member in acquiring 'asset X'. In essence, the Ombudsman found that the Schemes sought to conceal their involvement in 'pensions liberation' arrangements with sham documentation and fictitious sales of assets.

Grounds of appeal

The findings of the Determination which are relevant to the grounds of appeal are as follows:

1. The Ombudsman had jurisdiction to consider the complaints brought by two of the respondents (Ms Y and Mr S) because they had been brought in time.

2. The Ombudsman had the power to direct the Trustees to restore all assets that the Schemes had lost in consequence of their breaches of trust.

3. The Trustees were dishonest and were therefore prevented from taking the benefit of the exoneration clauses under the Schemes' documentation.

4. One of the respondents (Mr G) had sought to realise his pension investments in 2018. The Ombudsman rejected the appellants' case that Mr G thereby gave consent to the realisation of his investments at a loss or that Mr G's negligence contributed to that loss.

The appellants brought an appeal against the Determination on four grounds:

1. Ms Y and Mr S's complaints had been brought out of time and the Ombudsman therefore had no power to determine their complaints ("**Ground 1**").

2. The Ombudsman was wrong in law to conclude that each Scheme was a single trust fund and should have concluded that each Scheme comprised of separate sub-trusts for each member ("**Ground 2**").

3. The Ombudsman erred in law in her application of the test of dishonesty and was therefore wrong to make findings of dishonesty against the appellants ("**Ground 3**").

4. The Ombudsman should have found that Mr G either consented to transactions involving his funds that resulted in loss, or that Mr G was contributorily negligent in relation to those transactions ("**Ground 4**").

Judgment[1]

Richards J dismissed all four grounds of appeal, upholding the Ombudsman's determination.

[1] References in square brackets are to paragraph numbers of the judgment.

Ground 1

This issue turned on whether Ms Y and Mr S had brought their complaints within time pursuant to Regulation 5 of the Personal and Occupational Pension Schemes (Pension Ombudsman) Regulations 1996, which provides that:

> "*(1) Subject to paragraphs (2) and (3) below, the Pensions Ombudsman shall not investigate a complaint or dispute if the act or omission which is the subject thereof occurred more than 3 years before the date on which the complaint or dispute was received by him in writing.*
>
> *(2) Where, at the date of its occurrence, the person by or in respect of whom the complaint is made or the dispute is referred was, in the opinion of the Pensions Ombudsman, unaware of the act or omission referred to in paragraph (1) above, the period of 3 years shall begin on the earliest date on which that person knew or ought reasonably to have known of its occurrence.*
>
> *(3) Where, in the opinion of the Pensions Ombudsman, it was reasonable for a complaint not to be made or a dispute not to be referred before the end of the period allowed under paragraphs (1) and (2) above, the Pensions Ombudsman may investigate and determine that complaint or dispute if it is received by him in writing within such further period as he considers reasonable*."

In Ms Y's case, the Ombudsman held that she only ought to reasonably have known of the relevant acts and omissions in May 2019, following discussions with the Financial Repayment Service. Therefore, since Ms Y's complaint was notified in January 2022, it had been brought in time pursuant to Regulation 5(2). In Mr S's case, the Ombudsman held that Mr S first knew, or reasonably ought to have known, about the relevant acts and omissions in 2021; his complaint, which was brought in 2022, was therefore also in time. The appellants sought to challenge the Ombudsman's findings by arguing that Ms Y and Mr S ought reasonably to have known of the relevant acts and omissions in 2015.

Richards J held that the appellants were in fact making "*an impermissible challenge to a factual finding*"; the appellants therefore needed to show that there was either no basis for the Ombudsman's conclusion or that the Ombudsman had ignored relevant considerations and taken into account irrelevant considerations [39]. Richards J went on to find that the

Ombudsman was entitled to conclude that the fact that Ms Y had complained about peripheral matters in 2015 did not mean that she ought reasonably to have known in 2015 that she had been "scammed" [40]. Similarly, in Mr S's case, the Ombudsman had drawn a common-sense conclusion that the mere fact Mr S was "getting a bit dubious" in 2015 did not mean that he should have known of the relevant acts and omissions [49].

Ground 2

The appellants did not dispute that, if each Scheme was a single trust fund, then the Ombudsman had the power to direct the appellants to reconstitute the entire fund. However, the appellants argued that the Trustees held the assets of the Schemes on separate sub-trusts for each individual member, rather than a single trust for all members collectively.

The appellants placed reliance on the fact that the term "Individual Fund" was defined in the Scheme Rules as being part of a Fund that is "*attributable to*" a particular member. However, Richards J rejected this argument, noting that this was "*simply a textual indication in a definitional provision*" and the appellants did not show how this definition was used in operative provisions [58].

Richards J then considered Clause 13 of the Establishing Deed of the Eleven Scheme, which provided that:

> "*The Trustee shall ensure that, in relation to each Arrangement of a Member, all contributions and other amounts paid by or in respect of the Member to the Scheme as permitted by the Rules are applied in accordance with the Arrangement and that, in the case of each and every Arrangement, a separate and clearly designated account is maintained in respect of each Member's Fund under the Scheme.*"

In *Dalriada Trustees v Woodward*,[2] the Court considered identical wording and concluded that the clause represented an 'accounting tool' to determine each member's benefit instead of establishing a sub-trust. The appellants sought to distinguish *Dalriada* on

[2] [2012] EWHC 2162.

the basis that the members of the Schemes had directed the Trustees to invest in specific investments pursuant to the Forms.

Richards J accepted that Clause 13 could, in principle, have a different legal effect from *Dalriada* if the clause was used in a different factual context. However, the Judge held that it did not necessarily follow that separate sub-trusts had been established simply because the members of the Schemes had directed the Trustees to invest in specific investments [64]. In any event, the Forms had been pre-populated and it could not even be said that the members of the Schemes had directed the Trustees to invest in specific investments [65]. Finally, the fact that the Forms provided for costs associated with a particular member's investments to be debited to that member's individual account was consistent with the 'accounting tool' described in *Dalriada* and did not necessitate the arrangement of separate sub-trusts [66].

Ground 3

The appellants sought to challenge Ombudsman's application of the test of dishonesty in *Ivey v Genting Casinos Ltd*.[3] In particular, the appellants argued that the Ombudsman failed to acknowledge that the appellants did not have the level of knowledge that a professional trustee would have in applying the test of dishonesty.

Richards J held that the appellants were in effect challenging the Ombudsman's conclusion as to how much allowance ordinary decent people would have made for the appellants' asserted inexperience. This was a challenge to a conclusion of fact and was to be determined on that basis [84]-[85].

The Judge went on to find that, irrespective of the appellants' alleged lack of experience, there were "*cogent factual findings that amply support*" the Ombudsman's findings of dishonesty [87]. In particular, the Ombudsman had made findings that the appellants had

[3] [2017] UKSC 67.

knowingly dissipated the Schemes' assets; made investments other than for the proper purposes of the Schemes; intentionally placed assets beyond the reach of the members; deliberately chosen bogus investments; paid grossly excessive sums as administration fees in breach of statutory requirements; and concealed the Schemes' inability to realise any proceeds [87].

Ground 4

The appellants accepted that, if the findings of dishonesty against the appellants stood on appeal, then they would not be able to establish that Mr G had given consent or that he was contributorily negligent [93]. Therefore, by virtue of the failure of Ground 3, Ground 4 similarly failed.

Conclusion

This case is of interest to practitioners as a reminder of the Court's approach to challenges to factual findings on appeal from the Ombudsman. This judgment also provides a helpful illustration of the application of the time limits for bringing complaints and the level of knowledge required under Regulation 5(2) as well as the application of the test of dishonesty in the context of pension schemes.

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