Barristers' Chambers

www.ashleymurraychambers.co.uk

Pensions – "A Little Knowledge is a Dangerous Thing" – T v T (variation of a pension sharing order and underfunded schemes) [2021] EWFC B67

Facts:

H and W cohabited 1992 and married 1995. H a commercial director and W a hospital administrator had 2 children (20 & 25). They had separated in 2013 when H left the Fmh and their decree nisi was in 2013. The DJ made a final financial remedy order in 2015. The order provided for the Fmh to go to W and H to retain his own home bought post separation with a 40% PSO to W of H's company pension (£826k ce) and both keeping their other pensions. The 40% PSO reflected the DJ's broad assessment of balancing value for W gaining the whole of the Fmh value.

There was delay in first the judgment delivery and then in completion of the pension annex with the pension managers wanting the box ticked as to W taking the PSO as an external transfer as it was understood the scheme required.

In 2016 H then appealed the final order (but not the PSO) before the Circuit Judge and when that appeal was compromised the Circuit Judge gave permission to obtain the DA - however no application was made.

By 2017 the pension in question had risen in value to £1.65m - but the company also reduced external pension transfers generally so that the £1.6m became a fund value of just £720k ce and W's 40% share fell to £290k ce. However, at the same time, the company also determined to allow internal pension transfers. In fact, the decision to reduce external valuations was to be reversed by the company in 2018 - but H did not reveal this information until considerably later (03/21) in the proceedings, notwithstanding an application for a new pension report to consider the underfunding of the pension in question which had been assumed as the reason for the company's reduction in external pension transfer values.

HHJ Hess was to find that W was incorrectly advised she was bound by the original choice of taking an external transfer, albeit at the time in question no alternative had actually been offered to her.

W however applied to the Court for a declaration that she should have advantage of 40% of the uplift in pension value which had occurred before the company had reduced external transfer values. HH J Hess ,as later accepted by W's counsel, considered that application however had been misconceived at law - the Court having no power to make the declaration sought. W also applied for the DA but H was granted a stay of that application.

H then applied for a variation of the original PSO and under **s31(4A)(b)** of the **MCA** 1973 which prevented the PSO being implemented in the interim. The DJ granted leave to obtain the DA and the DA was then pronounced the same day (which meant, as HHJ Hess was to point out, that had H then died W would have had no entitlement to widow's benefits or a PSO, which, of course, remained unimplemented).

H's case upon his application to vary the PSO was that the DJ had originally offset the value of the pension share to W and, in fact, the PSO should more fairly be reduced as a result down to 17% from the 40% and certainly not increased to provide W with any share of the uplift in value which had occurred during the delay period.

In advance of the final hearing before HHJ Hess, the pension administrators under His Honour's direction for more information, confirmed the reversal of the cev external transfers reductions (which reduction had triggered in any event the obligation in law for the company to offer the provision of an internal transfer). In addition, they confirmed the value of the pension had now further risen to £2.4m, largely as a result of the discount calculation rate linked to gilt market yields.

Following this information, W made an open offer for H to withdraw his variation application with costs - which H rejected.

Judgment:

HHJ Hess emphasised the situation presented was a classic example of the "*moving target*" syndrome (H v H 2 FLR 173 - Baron J) where pension values changed sometimes quite dramatically between order and implementation and that the binding dicta of Baron J was that a pension share annex should go no further than to express the percentage of the pension share - and not eg "*such sum as would provide a set percentage*".

Where an underfunded (ie insufficient funds to meet all obligations to members) pension scheme has determined to offer reduced external transfers then pursuant to the **Welfare Reform and Pensions Act 1999**. **sched 5 para 1(2)** and the **Pension Sharing (implementation and Discharge of Liability) Regulations 2000, SI 2000/1053 reg 16** an ex

spouse cannot be forced to accept an external transfer on a reduced cev. Instead, the pension administrators must in such circumstances offer the option of an unreduced internal

transfer. In the event the ex spouse still wishes to opt for the external reduced transfer, then such reduction must be entirely proportionate with the extent of underfunding involved generally within the pension fund (see **Pension Sharing (implementation and Discharge of Liability) Regulations 2000, SI 2000/1053 reg 16 [44]**).

HHJ Hess, whilst acknowledging that the Court had a variation jurisdiction with regard to a PSO under **s 31(2)g** of the **MCA 1973,** such power was limited to where such an application preceded the DA and the implementation of the PSO itself. - a situation which would be rare.

His Honour accepted in identifying how this power should be used it was apt to draw first upon the wording of the general variation jurisdiction of **s 31(7)** where the Court did have power to vary a capital lump sum order by instalments. Then secondly, to consider the exercise of such power, preferring the description of the limits of this power as expressed by Bodey J in **Westbury v Sampson (2002)** 1 FLR 166 (approved obiter by Lord Wilson in **Birch v Birch (2017)** UKSC 53) as opposed to the most recent analysis given by Mostyn J in **BT v CU (2021)** 53.

Bodey J had accepted that a variation was possible as to quantum and timing but such power, he had stated, should be used sparingly and only when "*anticipated circumstances have changed very significantly and/or for cogent reasons rendering the (original order) quite unjust and impracticable*" - whereas Mostyn J had indicated that the power was to be limited to "*recalibration of the payment schedule only* "and any attempt to change the quantum was dependent upon satisfying the stricter **Barder** conditions, which HH J Hess considered did not apply in this case. Indeed, His Honour considered if Mostyn J was correct then applied to the pension variation power under consideration - it was difficult to see how such a variation would ever be permissible.

HHJ Hess was of the view that the core issue involved in the circumstances of this case where the parties' circumstances were largely unchanged since 2016 related to the change in H's pension cev.

His Honour determined that the change in that CE did not justify a variation for three reasons:

i) the CE of a defined benefit pension is actuarily calculated upon what sum of money would be required to produce externally the income a pension fund is obliged to pay a scheme member during their retirement. As financial markets change over time, this amount will do likewise and particularly in regard to gilts. - so that, if W was now to get a CE based only on the 2015 figures she would lose out - H

and his legal team, His Honour found, had misunderstood this approach to the CE calculation;

ii) Hence withi the pension fund concerned, H's own 60% share had commensurably increased in value just as W's 40% share had done - and now no injustice would be done by W getting more by her 40% share;

iii) it was H's own actions which had led to the delay in implementation of the PSO in this case which by the operation of the "moving target syndrome" had led to the pronounced difference now.

Costs:

HHJ Hess was highly critical of the costs incurred in the applications being £130k for W and £175k for H as "shaming for the legal system" especially as the lawyers involved appeared to have limited understanding of the issues involved. As H had taken an unreasonable stance from the outset he was to pay £100k of W's costs.

Section F:

By observation, HHJ Hess also pointed out that the pension administrators had previously written to W's solicitors to tick the "*external transfer*" box - but such a decision was of particular financial importance to an ex spouse for which careful advice should be taken. As an example had the PSO been implemented in 2017 and W had contrary to the law only been offered an external CE reduced transfer , then she would have incurred a substantial financial loss on the basis of a tick in a box. The PAG report had already warned family lawyers not to tick either boxes in section F of the annex.

Commentary:

It is a matter of some concern that HH J Hess found that W:-

> *"…took legal advice from Solicitors and Counsel. It appears from the documents that I have seen that neither her Solicitors nor her Counsel (nor indeed Company D ie the pension administrators) advised the wife of the existence of a remedy which would for all practical purposes have solved her problem, the selection of an internal transfer for the pension sharing order (I set out the statutory basis of this remedy in my section on the law below). There is no reason why the wife herself should have known about this solution to her problems, but it is disappointing that her lawyers did not know of its existence and arguably also troubling that the pension administrators did not alert her to this issue (a theme I shall discuss in more general terms below in the context of some recommendations made in the Pensions Advisory Group (PAG) report).*'

In addition, H, too, had been unaware until the hearing before HHJ Hess of the availability at law of the internal transfer option:-

> *"Apparently neither his direct access Counsel (instructed on 18th April 2018) nor his full legal team of Solicitor and Counsel (whom he instructed from November 2018 onwards) knew about it or, if they did, they did not tell the husband about it."*

These omissions in advice were only compounded by the potential financial loss that could have been incurred also by the obtaining of the DA as referred to above.

It also appeared to HHJ Hess that the probably unjustified decision by the DJ not to hold a FDR may also itself have contributed to the failure to avoid the costs they eventually incurred.

This catalogue of errors was only to be compounded further by the parties and finally the Husband's legal team seeking questions of an actuary which involved seeking clarity of the effect of underfunding when the pension administrators were already providing an internal transfer option which made such enquiries irrelevant. Despite the laudable attempt by the actuary approached to point out the error of such instruction and to decline the instructions the counsel and solicitors involved did not appreciate the point being made.

The warnings to lawyers since the advent of the pension powers in financial remedy cases over two decades ago have been repeated again and again. Lawyers are not pension actuaries, nor are they tax experts or valuers - these are each areas for the particular expertise in question to be engaged - and almost in all cases - unless the evaluation sought is particularly obvious and, of course, in the pension arena the PAG report itself outlines the boundary after which an actuary should enter the arena.

Practitioners are familiar with the pressure often brought to bear by a client wishing to limit their costs at an early stage - and in this context, it is often tempting to consider that the pension values involved are either relatively similar or "*modest*" overall so as to justify not pursing a pension report. Yet the present case is testimony to not seeking out the specialist opinion where the PAG report would advise otherwise of where, as here, the issue was an unfamiliar one.

Added to this, the practice of filling in section F of the annex is to be avoided - without specialist advice - pending the removal altogether of this part of the annex as has been recommended.

Ashley Murray **December 2021.**